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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 2001

Philip Lewis Hart,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an income tax that diminished the wages or salary of a Citizen of the United States living and working in the several States is a direct tax.

II. Whether the executive department of government is barred from collecting a tax unless the People have consented to the tax.

III. Whether the Sixteenth Amendment to the Constitution provides an exception to the direct taxation clauses of the Constitution such that a direct tax may be levied within the several States without apportionment.

IV. Whether the Tax Court was in error in ruling against the Petitioner in the instant case when that court relied on the case of Abrams v. Commissioner, 82 T.C. 403 (1984) which in pertinent part held and stated at page 407, "Since the ratification of the 16th Amendment, it is immaterial with respect to income taxes whether the tax is a direct or indirect tax." And whether the United States court of appeals for the Ninth Circuit, relying on the same case, erred in affirming the Tax Court's Decision.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to this proceeding. The Petitioner in this case is not a corporation.

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OPINIONS BELOW

The memorandum for the United States court of appeals for the Ninth Circuit is included in the appendix at Appendix C pages 9a-10a.

The Memorandum Opinion for the Tax Court can be found at Hart v. Commissioner, 79 T.C.M. (CCH) 1619 (2000).

The Decisions of the United States Tax Court can be found at Appendix H pages 109a-111a.

JURISDICTION

The United States court of appeals for the Ninth Circuit filed its Memordaum on July 31, 2001. (Appendix C at 9a-10a) The instant Petitioner filed a timely Petition for Rehearing *En Banc* which the Ninth Circuit denied on January 9, 2002. The Ninth Circuit's Order can be found in the appendix at Appendix A at 2a. This Petition for Writ of Certiorari is timely filed within 90 days of the Ninth Circuit's denial of the Petition for Rehearing, and this Court's appellate jurisdiction is invoked under Article III, Section 2 of the Constitution.

CONSTITUTIONAL PROVISIONS

Article 1, Section 2, Clause 3.
"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

Article 1, Section 8, Clause 1.
"The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States."

Article 1, Section 9, Clauses 4 and 5.
"No Capitation, or other direct Tax, shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken....No Tax or Duty shall be laid on Articles exported from any State."

Sixteenth Amendment.
"The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

STATEMENT OF THE CASE

The issue in this case is whether or not the Internal Revenue Service may collect an unapportioned direct tax from a Citizen of the United States living and working in the several States. The IRS claims at page 17 of its publication entitled *The Truth About Frivolous Tax Arguments* that "The courts have both implicitly and explicitly recognized that the Sixteenth Amendment authorizes a non-apportioned direct income tax on United States citizens and that the federal tax laws as applied are valid."

Administratively, Hart objected to the collection of such an unapportioned direct tax and subsequently filed a petition to the United States Tax Court. At the Tax Court hearing, Hart attempted to enter into the record documents that would have settled this question in Hart's favor only to be rebuffed by a hostile judge who later limited Hart to a 10-page brief. Hart stated at page 10 of his Tax Court Brief, "The scope of the Sixteenth Amendment does not provide authority for an unapportioned direct tax on wages and salaries." (Appendix F at 72a.)

In the Tax Court's (Hart v. Commissioner, 79 T.C.M. (CCH) 1619 (2000) Op., that Court relied on Abrams v. Commissioner, 82 T.C. 403 (1984) which in pertinent part held and stated at page 407, "Since the ratification of the Sixteenth Amendment, it is immaterial with respect to income taxes whether the tax is a direct or an indirect tax."

On appeal to the Ninth Circuit, the first issue in Hart's opening brief was "Issue #1: Taxes which diminish earned income from Labor are Direct Taxes. There is no exemption to the Constitution's apportionment rule for Direct Taxes levied on Citizens of the several States."

The Ninth Circuit's Memorandum for the instant case cited two cases in affirming the Tax Court's Memorandum Opinion. The cited cases were Abrams v. Commissioner, *supra* and In Re Becraft, 885 F.2d 547 (9th Cir. 1989). In the Ninth Circuit's Order on page 548 of In Re Becraft, the Ninth Circuit held that the Sixteenth Amendment authorizes a "non-apportioned direct income tax."

Petitioner Hart makes his living in the private sector as an engineer and is a Citizen of the United States and a Citizen of one of the several States of the Union. Hart has never lived anywhere outside of these several States, nor has Hart ever been an employee of any

government nor its instrumentalities. Consequently, Hart has been, for his entire life, an Inhabitant of the several States. (Appendix F at 60a-61a.) Hart has determined that any tax levied by Congress upon his labor, which tax Hart must pay, is a direct tax and is required by the Constitution to be apportioned among the several States. (Appendix F at 71a.)

Hart has received two notices of deficiencies from the Commissioner. The first was for the years 1994 and 1995 and the second was for 1996. In the first Notice of Deficiency (for 1994 and 1995) the Commissioner claims that Hart had "taxable income" of $29,674 and $38,781 respectively upon which an income tax (actually an addition to tax and penalties) was due in the amount of $6,422 and $9,810. The second Notice of Deficiency attempts to collect an addition to tax plus penalties of $16,286 for an early withdraw of money from an IRA account. All monies placed into this account were monies Hart earned from his labor.

Realizing that Congress' ability to levy and collect an unapportioned direct tax was limited to specific geographical areas and districts without the several States and/or specific classes of persons, none of which included Hart, Hart sought a refund of monies mistakenly paid to the Commissioner for the year 1994. Hart subsequently filed a Petition with the United States Tax Court and later appealed to the United States court of appeals for the Ninth Circuit pursuant to 26 U.S.C. 7482 (b) (1).

REASONS FOR GRANTING THE WRIT

The United States court of appeals for the Ninth Circuit has decided the instant case in a way that conflicts with prior decisions of this Court. Collectively the circuit courts are in disarray in their conflicting decisions of whether or not an income tax is a direct tax or an indirect tax, and whether or not the Sixteenth Amendment provides an exception to the direct taxation clauses of the Constitution such that a direct tax may be levied within the several States without apportionment. Similarly, the state courts are also in disarray on this question. This issue was long ago settled by this Court.

Yet for decades there has been a never-ending train of litigants who have brought the issue of a nonapportioned direct tax before the lower courts. Not only has this question been decided in a variety of

ways, but there is a large body of Citizens of this country that believe none of the courts, at least in the lower courts, have yet settled this question right. There is no clear and unambiguous judicial record of whether or not the Sixteenth Amendment provides an exception to the direct taxation clauses of the Constitution. This train of litigants will continue until this question is settled right.

Such an environment of uncertainty has been the breeding ground for a complex tax system that now claims to make the average Citizen subject to many tens of thousands of pages of statues, regulations, treasury decisions, rules and manuals.

Furthermore, there is great consternation among Citizen groups over the uncertainty of the law on the income tax issue. At least one group, We the People Foundation for Constitutional Education of Queensbury, New York, has formally petitioned the executive and the legislative branches of government for a resolution of the uncertainty of the income tax law. Every reasonable effort has been made by the We the People Foundation to engage the government in a productive resolution of these uncertainties only to have their Petition for Redress of Grievances ignored. According to We the People Foundation for Constitutional Education, we are now in a constitutional crisis.

I. Income taxes on wages and salaries are direct taxes.

a. Direct vs. Indirect. On the issue of income taxes in general, there exists among the circuit courts every conceivable interpretation as to whether or not the constitutional classification of the income tax is direct, indirect, neither, both or irrelevant. For example, in the First Circuit it is difficult to discover if that circuit determined if the tax was direct or indirect because in United States v. Turano, 802 F.2d 10, 12 (1st Cir. 1986), that court held that the "Sixteenth Amendment eliminated the indirect/direct distinction as applied to taxes on income."

Next door in the Second Circuit, there is uncertainty revealed by three completely inconsistent cases. In Jandorf's Estate v. Commissioner, 171 F.2d 464, 465 (2nd Cir. 1948), that court declared, "It should be noted that estate or inheritance taxes are excises * * * while surtaxes, excess profits and war-profits taxes are direct property taxes." Surtaxes are the graduated taxes of the income tax, so this court holds the personal income tax is a direct tax. But in Ficalora

v. Commissioner, 751 F.2d 85, 87 (2nd Cir. 1984), that court stated the personal income tax was an indirect tax. But compare United States v. Sitka, 845 F.2d 43, 46 (2nd Cir. 1988) citing *Parker*, infra, for the proposition that the income tax is direct.

In the Third Circuit, it has been held in one case that all income taxes are direct, but in another that only some are direct; see Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894, 897 (3rd Cir. 1943)("[A]n income tax is a direct tax upon income therein defined"); and Penn Mutual Indemnity Co. v. Commissioner, 277 F.2d 16, 19 (3rd Cir. 1960)("Pollock *** only held that a tax on the income derived from real or personal property was so close to a tax on that property that it could not be imposed without apportionment. The Sixteenth Amendment removed that barrier").

In the remainder of the Circuits, the difference of opinion as to whether the federal income tax is a direct or indirect tax is likewise as profound and confusing. In the Fourth and Sixth Circuits, the income tax has been held to be an excise tax; see White Packing Co. v. Robertson, 89 F.2d 775, 779 (4th Cir. 1937)("The tax is, of course, an excise tax, as are all taxes on income * * * "); and United States v. Gaumer, 972 F.2d 723, 725 (6th Cir. 1992)("*Brushaber* and the Congressional Record excerpt do indeed state that for constitutional purposes, the income tax is an excise tax"). However, in the Fifth, Seventh, Eighth and Tenth Circuits, arguments that this tax is an excise tax have been squarely rejected and determined to be frivolous. The Ninth Circuit claims it is irrelevant whether or not the tax is direct or indirect, while the Eleventh Circuit appears to have not yet decided the question.

b. Income taxes on wages and salaries are direct taxes. In our attempt to discover the meaning of the terms "direct tax" and "indirect tax" we must look back in time to the period of the framing of the Constitution in order to discover what the framers understood these terms to mean. And whatever we discover those terms to mean, we are bound to that discovery.

At the time of the writing of the Constitution there were two authors well known to the framers who used the terms "direct" and "indirect" taxes. These were Adam Smith, who wrote *Wealth of Nations*, and the physiocrat Jacques Turgot from France. Adam Smith published his work *Wealth of Nations* in 1776, eleven years before the

writing of the Constitution.

> "If the term 'direct taxes' had been used for the first time in the Constitution, and we could not, therefore, trace its source, much might be left to doubt and to surmise. A large majority of the Constitutional Convention were scholars, 35 of its members were college graduates, and the eight leaders of the great debate were all college men. Were they likely to use terms they did not understand? Had they never seen the term direct tax before; and, if so, where? In the books that were in every man's hand. Many had studied Turgot in the original or in translations of particular passages, and they knew his clear definition of 'Les impôts directs.' Turgot today is still the great work put in the hands of French students of the science of finance and government. Every member of that Convention was familiar with the handbook of statesmen of that age - Adam Smith's Wealth of Nations... Macaulay tells us that Pitt studied only one work on political economy, which guided him through his whole brilliant career in the financial administration of the British Empire, and that was Smith's Wealth of Nations. If we had only these two works, known to almost every educated man in those days, could we refuse to follow their definitions and explanations in the absence of any other evidence?" Opening argument of Appellant at 7-8, Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895).

> "Mr. CUMMINS. I had referred to the fact that at the time of the Constitutional Convention, so far as I can now recall, this term had been mentioned by but two economic writers - one, Adam Smith, in the Wealth of Nations, and the other a French writer by the name of Turgot. Their general idea was that a direct tax was a tax upon property or [gross] revenue and an indirect tax was a tax upon consumption or expense." 44 Cong. Rec. 3972 (1909)

Although Turgot was from France, he did not fully accept the older taxation doctrines of the French Physiocrats. In Turgot's work, Plan d'un mémoire sur les impositions, 1764, he wrote:

> "The tax which the proprietor pays immediately on his revenue is called direct tax. The tax which is not assessed directly on the revenue of the proprietor, but which falls on the cost of production of the revenue, or on the expenditure of the revenue, is called

indirect tax." Teachings of Political Economists defining Direct and Indirect Taxes, at 3, by Max West, Pollock v. Farmers' Loan and Trust Co., 157 U.S. 629 (1894).

When these writers, Smith and Turgot, used the word "revenue" it was gross revenue to which they were referring. In the This Court's *Decision* for the *Hylton Case*, 3 U.S. (3 Dall.) 171 (1796), the following quote from Adam Smith's *Wealth of Nations* was used authoritatively:

> "The impossibility of taxing people in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the State, not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed, in most cases, will be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out." Adam Smith, Wealth of Nations, Book V, 541 (Prometheus Books, Amherst, New York, 1991) (1776).

If we back up two paragraphs from the paragraph of Adam Smith's *Wealth of Nations* quoted authoritatively by this Court in the *Hylton Case*, we read:

> "Capitation taxes, so far as they are levied upon the lower ranks of people, are direct taxes upon the wages of labour, and are attended with all the inconveniences of such taxes." *id.* at 540.

In Book V of Adam Smith's *Wealth of Nations*, Smith has a four-page section entitled, "Taxes upon the Wages of Labour." Five times in this section Smith states that a tax on wages is a direct tax. And as we saw above, Smith says it is a species of a capitation tax. *id.* at 534-38.

In the 1909 congressional debates over the Sixteenth Amendment, Adam Smith was quoted far more than any other authority and was always quoted with approval. Adam Smith was quoted 18 times, Albert Gallatin[1] four times and Jacques Turgot, three times. There were numerous other political economists quoted, but these three dominated the debate. Just as Adam Smith greatly influenced the framers of the Constitution, he was also the respected and undisputed authority on taxation among those members of Congress who debated the Sixteenth Amendment.

"There is every reason to believe that the framers of the Constitution followed the usage of Adam Smith, who eleven years before the convention met had refuted the Physiocratic doctrine as to the incidence of taxes. Albert Gallatin, writing in 1796, stated emphatically his belief that the distinction in the minds of the framers of the Constitution was that of Adam Smith. Gallatin was born and bred a Frenchman, and would have been as likely as any American of the time to accept the Physiocratic view; and in the absence of any evidence to the contrary the testimony of such an authority as Gallatin should be considered conclusive in any question of finance." Max West, The Income Tax and National Revenues, 8 The Journal of Political Economy 433, 435 (1900).

Albert Gallatin, in his *Sketch of the Finances of the United States*, wrote:

"The most generally received opinion, however, is, that by direct taxes in the Constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense.

The taxes which it is intended should fall indifferently upon every different species of revenue are capitation taxes...These must be paid indifferently from whatever revenue the contributors may posses." Rehearing Brief of Appellant at 112, Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895).

Quoting the Congressional Record on May 17, 1909 as the Senate continued to debate the issue of an income tax amendment to the Constitution, Senator Sutherland of Utah said:

"This view is confirmed by the comments of Albert Gallatin

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[1] Albert Gallatin was raised in France, was a member of the Constitutional Convention, a member of Congress in both the House and Senate, and Secretary of the Treasury. On November 12, 1796, he published his famous work entitled *Sketch of Finances of the United States*. Mr. Gallatin fully accepted Smith's distinction between indirect and direct taxes while rejecting the French Physiocractic limitation that direct taxes were only capitation taxes and taxes on land. Adam Smith himself also spent two and one-half years in France attending many meetings with the French Physiocratics.

In the House he had been chairman of the Ways and Means Committee. Thomas Jefferson appointed him Secretary of the Treasury in 1801 where he served until 1814. He held this position longer than any other man in American history.

in his Sketch of the Finances of the United States, written a year or two after the decision [of the Hylton case]. He says:

'The most generally received opinion, however, is that by direct taxes in the Constitution are those meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense... it will not be improper to corroborate it by quoting the author from whom the idea seems to have been borrowed. (Naming Doctor Smith's Wealth of Nations.)'" 44 Cong. Rec. 2094 (1909)

Senator Sutherland then quotes from Smith the same statements contained in Justice Paterson's opinion given on the *Hylton Case*, and continues:

"The remarkable coincidence of the clause of the Constitution with this passage in using the word 'capitation' as a generic expression, including the different species of direct taxes, an acceptation of the word peculiar, it is believed, to Doctor Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by direct taxes meant those paid directly from and falling immediately on the revenue; and by indirect, those [falling] upon the expense. It has indeed been held by some that 'direct taxes' meant solely that tax which is laid upon the whole property or revenue of persons.... instead of admitting only one kind of direct tax [in the Constitution], expressly recognizes several species by using the words 'capitation' or 'other direct tax' and 'direct taxes.'" 44 Cong. Rec. 2094-5 (1909).

In debate over the income tax amendment in the Senate, Mr. Sutherland has again quoted from the *Hylton Case* and said:

"He [Mr. Justice Chase] then says he will close his 'discourse' - he does not call it an opinion or decision - by reading a passage or two from Smith's Wealth of Nations. Let me read one quotation: 'The impossibility of taxing people in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the State, not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed, in most cases, will be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodi-

ties upon which it is laid out.'

Clearly, in the opinion of Adam Smith, which the Supreme Court in this earliest case cited with approval, a direct tax is upon the revenue of the taxpayer, while an indirect tax is a tax upon his expense..." 44 Cong. Rec. 2093 (1909).

So here we have the words of Adam Smith quoted multiple times in the *Hylton Decision* from 1796, quoted again in Gallatin's work of 1796, quoted again in the *Pollock Decision*, and quoted many times in the Congressional Record during the debates on the Sixteenth Amendment. All agreed that a tax on the revenue of a person is a capitation tax. Because this Court says the Sixteenth Amendment did not create a new type of tax, then the tax on the revenue of a person is still a direct tax.

Point two in the *Pollock Decision* states: "Second. We are of the opinion that taxes on personal property or on the income of personal property are likewise direct."

The purpose of the Sixteenth Amendment was to overturn *Pollock*. According to the American People, this Court had expanded the definition of "direct taxes" too far. Using the constitutional amendment process, the American People sought to redefine the boundary line between direct taxes and indirect taxes. The *Pollock Case* dealt only with taxes on net income from real estate and net income from personal property. These taxes did not diminish the underlying source of the income and are therefore inherently indirect taxes. It was only these taxes that the American People sought to exclude from direct taxes by moving the boundary line that separated direct taxes from indirect taxes. Taxes on wages and salaries were outside of the scope of the *Pollock Case* and were likewise not part of the Sixteenth Amendment debate.

In writing about the income tax of 1894, which was the subject of the *Pollock Case*, Professor Seligman[2] said: "The first point that arrests our attention is that the tax is really an income tax - i.e. a tax on net gains or profits, and not, as in some other countries, on gross

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[2] Professor Edwin Seligman, Ph. D., was head of the Economics Department of Columbia University and part of the investment banking family of J. & W. Seligman. He was also a prolific writer on the income tax issue having written an exhaustively researched 700 - page book entitled *The Income Tax* (The MacMillian Co., 1911). He was also an expert witness on the *Pollock Case* and had testified several times before Congress on the issue of taxation.

income with or without certain deductions." Edwin R.A. Seligman, The Income Tax, 9 Political Science Quarterly 610, 620 (1894).

Direct taxes on real estate and personal property, which diminish the source of the income, i.e. taxes on gross receipts, were outside the scope of the *Pollock Case*. Wages and salaries are considered to be personal property and the question of taxes on these was not squarely addressed by the *Pollock Court*.

The general rule is that whenever a tax is on gross receipts, or as Adam Smith said, "on the revenue" of something, the tax is direct. This is true because a gross receipts tax diminishes the value of the thing taxed. The tax falls directly on the thing taxed. Whereas an income tax, which taxes only the gains and profits (net income) of a source of income, does not diminish the underlying source of the income. Income is that which can be severed from the source without diminishing the source. An income tax diminishes only the income flowing from the source. The source of the income remains whole.

> "A tax levied on property that produces no income can be paid only through the confiscation of a part of the property." Prof. Isaac A. Loos; Allen Ripley Foote, The Power of Taxation Should be Regulated, State and Local Taxation, Second International Conference, International Tax Association, 203, 206 (1909).

In a brilliant 1910 article on the Sixteenth Amendment appearing in the Yale Law Journal, Author Arthur Graves wrote:

> "Practically, it is not every kind of income tax which is a direct tax. The term 'income tax' has been too generally and broadly used to cover a variety of taxes imposed on persons and property which may ultimately be payable out of income...Some of the taxes imposed under the internal revenue provisions of our Civil War, while payable out of income or revenue, were not properly income taxes, as, for instance, the tax on premium receipts of insurance companies, and possibly that on bank profits and undivided surplus. But the income tax levied against the general income of the citizen is of a very different nature. It is distinctly a personal tax and undoubtedly a direct tax; in fact, it is difficult to conceive of a tax more direct or personal in its nature than the general income tax.
>
> It may be said in defense of the earlier decisions of the Supreme Court, regarding income taxes, that as the question is not

at all a simple one, but surrounded with a great many economic perplexities, the failure to distinguish between the general income tax levied against the person and an excise tax levied against specific sources of revenue, or against property of business, but payable out of income, is not surprising.

It is very interesting to notice in this connection that George Ticknor Curtis, who became one of our foremost American jurists, writing in 1866, declared that the personal income tax was undoubtedly a direct tax and ought to be levied by apportionment among the several States. He had the courage to suggest that, 'the personal income tax of the Civil War was unconstitutional and the revenue therefrom illegally collected.'" Arthur C. Graves, Inherent Improprieties in the Income Tax Amendment to the Federal Constitution, 19 Yale Law Journal 505, 508-9 [1910].

"Certainly it would be difficult to conceive of any tax, or legislative assessment, more direct in its operation and nature than a tax on a man's income." George Ticknor Curtis, An Inquiry into one of the Constitutional Restrictions on the Revenue Powers of the United States, 33 Harper's New Monthly Magazine 354, 355 (1866).

"To speak of a poll tax (or other direct tax on a natural person) as a tax on property requires resort to the legal theory that a freeman is owner of himself and his labor force in a sense analogous to a master's ownership of his slave." Prof. Isaac A. Loos, Allen Ripley Foote, The Division Between State and Local Taxation, *supra* at 206.

"Direct taxes are those that are levied 'upon the very person who it is supposed as a general thing will bear their burden.' The general property, the income tax, the poll tax, may be classed as direct taxes for the reason that when a person pays one of these taxes, he is likely to bear the burden himself and is not likely to shift it to another." Israel Freeman, Constitutionality of Federal Corporation Tax Law, 72 Central Law Journal 59 (1911).

In the case of Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1883), Justice Field wrote in his concurring op. at p. 757:

"It has been well said that, 'The property which every man has in his own labor, as it is the original foundation of all other property,

so it is the most sacred and inviolable.'"

Here Justice Field was quoting from Adam Smith's *Wealth of Nations*, book I, chapter 10. The point being made is that a tax on labor is a tax on property.

There were several times in the early history of America when direct taxes were imposed. These included taxes on slaves levied in 1798. Now what is it that gives a slave value such that it can be a thing taxed? The value of a slave is determined by the present worth of the expected future value of the slave's labor. A direct tax on a slave is a tax on labor. Just as the historical taxes on slaves were direct taxes so is today's tax on labor a direct tax.

Labor is property. An income tax that diminishes one's wages or salary is a tax that diminishes the value of that property. Such a tax is wholly different from a tax that diminishes net income after that income has been severed from the source.

The rule created by the Sixteenth Amendment, that one must not consider the source when determining if an income tax is direct or indirect, only applies to an income tax on net income that has been severed from the source.

This rule cannot also apply to income taxes on gross income unsevered from the source, as the source is diminished by the tax. When the tax is on gross income, one must consider the source in determining whether the tax is direct or indirect. If this statement is wrong, then we are claiming we are not taxing something that we are taxing. Such logic is Orwellian and no different than claiming war is peace, ignorance is strength and slavery is freedom.

A tax which diminishes a man's wage or salary is a direct tax. It is a capitation tax. Capitation taxes are required by the Constitution to be apportioned among the several States. Capitation taxes are outside the scope of the Sixteenth Amendment.

An exhaustive search of the relevant literature on this point yielded no authorities to rebut this position.

II. No tax may be imposed on the American People without their consent.

In the Declaration of Independence, one of the Grievances against King George III listed by the American Colonists was, "For imposing taxes on us without our consent." The Declaration of Independence further states, "That to secure these rights, governments are instituted

among men, deriving their just powers from the consent of the goverened."

This Court has previously ruled that those Grievances listed in the Declaration of Independence provide a foundation as to the purpose of the American government and also the boundaries as to its power. The Declaration of Independence is America's Great Charter; the Constitution is America's by-laws. Government has only that power for which the People have consented to delegate to it.

The idea that taxes may not be levied unless the People consent to them dates back 800 years to another great charter, that of the Magna Carta of 1215. King John, a disorganized ruler, had just suffered an expensive and humiliating defeat by losing Normandy to the French. He desperately needed money and was pressing all in his kingdom with higher taxes.

> "Magna Carta was the culmination of a protest against the arbitrary rule of King John, who was using governmental powers which had been established by the great builders of the English nation, William the Conqueror, Henry I, and Henry II, for selfish and tyrannical purposes. In general these abuses took the pattern of increasing customary feudal obligations and decreasing established feudal rights and privileges. The Barons were forced to pay higher taxes above the usual rate... The merchants of London were burdened with heavy taxes... In addition, John's administration was disorganized and inefficient, and he employed unscrupulous foreign adventurers as royal officers and as sheriffs and bailiffs in every county of the land." Perry, Richard L.; Cooper, John C., Sources of Our Liberties , 1-2 (William S. Hein & Co., Buffalo, New York, 1991).

The requirement that taxes cannot be levied unless the people consent to them appears in Magna Carta at chapters 12 and 14. But Magna Carta itself was a result of not only abusive and unjust taxation, but also taxation that was in violation of the Charter of Liberties of King Henry I. Henry I became king in 1100 A.D. when his brother, King William, was removed from the throne because of "unjust exactions."

Unfortunately it is the habit of government to exceed its lawful boundaries and by 1297 the administration of Edward I was levying taxes in violation of Magna Carta. The abuses were serious. In August of 1297, while the barons were formally presenting their griev-

ances to the king, they were also arming and preparing for revolution. Revolution was avoided when on November 5, 1297, King Edward signed Confirmatio Cartarum.

> "The events leading up to Confirmatio Cartarum, like those which led up to Magna Carta, show that the king's violation of established laws oppressed the community as a whole and caused the barons and the clergy to unite in demanding the observance of the law. As was also true of Magna Carta, this oppression often took the form of illegal and unreasonable taxation.
>
> Confirmatio Cartarum has had two principal effects upon the development of the liberties of the citizen. First it established Parliament as a truly representative organ of government by providing in Section 6 that the taxes must be raised by the common assent of the realm. The imposition of direct taxes without the consent of the people's representatives in Parliament was now against the very letter of the law."Perry; Cooper, *supra* at 24-6.

The principle that government must have the consent of the People before levying any tax showed up on the American continent in 1618 with the Ordinances for Virginia. "The governor should not be allowed to levy taxes on the colony without the consent of the assembly." Perry, Cooper, *supra* at 50.

The Petition of Right of 1628 was yet another attempt by the English people to compel the administration of Charles I to obey the law. Again, one of the abuses was taxation without the consent of the governed. At Section X the document states, "That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such-like charge, without common consent by act of Parliament."

The Charter of Massachusetts Bay of 1629 provided for taxation only when consented to by the assembly of freemen. So did the Charter of Maryland of 1632. Other colonies declared that the colonists had all the rights of Englishmen and that Magna Carta and all subsequent documents that secured those rights applied to the freemen of the colonies including the Bill of Rights of 1689.

The Bill of Rights of 1689 was the culmination of a revolution that took place in England which overthrew James II. Again, one of the major abuses of the absolute rule of James II was illegal and abusive taxation. The preamble and forth clause of the 1689 Bill of Rights states, "WHEREAS the late King James the Second, by the assis-

tance of divers, evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom... 4. By levying money for and to the use of the crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by parliament."

The remedy provided by the Bill of Rights of 1689 was that taxes could not be levied except "4. That levying money for or to the use of the crown, by pretence or perogative, without the grant of parliament, for longer time, on in other manner than the same is or shall be granted, is illegal."

Back on the American continent was the Resolutions of the Stamp Act Congress of 1765. American Colonists objected to the Stamp Act as it imposed taxes on them without their consent. "John Adams denounced the Stamp Act as a violation of Magna Carta." Perry; Cooper, *supra* at 10.

Various colonial assemblies passed resolutions condeming the Stamp Act. The Virginia House of Burgesses was the first. Four of seven resolutions offered by Patrick Henry were passed including number 1 and number 3 below:

> "(1) That the first settlers of Virginia brought with them all the liberties, privileges, franchises, and immunities of British subjects; (3) that under the British constitution taxes could be levied only by the people or their representatives."

Most of the other colonies passed varying degrees of the Henry resolutions. They also called for a congress of representatives to meet in New York and condemn the Stamp Act. Nine of the colonies sent representatives to the congress.

> "There was little difference of opinion as to the fundamental questions involved... Resolutions 2 thru 8 expressed the constitutional theory of the colonists that all taxation... without the consent of the people's representatives was illegal... 'No nation ought to be taxed against its own consent. England had passed through many a year of civil war in defence of the proposition'" Perry; Cooper, *supra* at 266-7.

The actual text of the Resolutions of the Stamp Act Congress of October 19, 1765 stated:

> "2d. That his majesty's liege subjects in these colonies are entitled to all the inherent rights and privileges of his natural born

subjects within the kingdom of Great Britain,

3d. That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives."

Likewise the Declaration and Resolves of the First Continental Congress of 1774 contained similar language about the necessity of consent for taxation. Additionally, Sir William Blackstone wrote in his *Commentaries on the Laws of England*,

"No subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament... And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition or right" Book I, p. 140 (1st edition, 1765).

This principle was memorialized in the Declaration of Independence. This is one of the great principles upon which the entire system of self government rests: The consent of the governed must be given to the taxes they must pay. When this principle is not in place, self government does not exist. Tyranny exists in its place.

The Commissioner claims that his authority to collect the tax in the instant case comes from the Sixteenth Amendment. As part of the Constitution, the Sixteenth Amendment must be interpreted using the everyday language and common dictionaries of the time. There are no "words of art" or "terms of art" in the Constitution, as it is We the People who determine what the Constitution means or doesn't mean. We the People don't speak using "words of art." We the People just use everyday language. Therefore the consent for the scope of the meaning of the Sixteenth Amendment is vested in the People, and that meaning will be plain for anyone to see once the evidence has been examined.

An exhaustive review of the Congressional Record during the time of the debates on the Sixteenth Amendment reveals no credible evidence that the members of Congress were contemplating a direct tax on the wages and salaries of the American People. An exhaustive review of other congressional documents during the ratification

process yields no evidence that Congress contemplated using the Sixteenth Amendment as a vehicle to place an unapportioned direct tax on the wages and salaries of the American People.

An exhaustive review of law journal articles of the time produced no articles that indicated Congress or the American People were contemplating a nonapportioned direct tax on the wages and salaries of the American People. No evidence was found in the journals on political economy and economics. Nor was any such evidence discovered in an exhaustive search of New York Times articles, which are all cataloged in yearbooks as the New York Times is a "newspaper of record."

As there is no evidence that can be found anywhere indicating that the American People sought to place an unapportioned direct tax on their wages and salaries, we can conclude that the American People never consented to the very tax that the Commissioner is attempting to collect in the instant case.

The entire weight of the evidence as to the purpose of the Sixteenth Amendment indicates that its objective was to place income taxes on net income from unincorporated business and investment into the classification of indirect taxes. *Pollock* was overturned by the Sixteenth Amendment. No more and no less. The purpose of the Sixteenth Amendment was to shift the tax burden off of consumption and onto incomes from the accumulated wealth of the country such as to bring tax relief to wage earners.

Since the signing of Magna Carta 800 years ago, it has been a well established principle of self-government among the English speaking people that the people must consent to their taxes. According to author R.L. Perry in *Sources of Our Liberties*:

> "The liberties of the American citizen depend upon the existence of established and known rules of law limiting the authority and discretion of men wielding the power of government. Magna Carta announced the rule of law; this was its great contribution. It is this characteristic which has provided throughout the years the foundation on which has come to rest the entire structure of Anglo-American constitutional liberties." *supra* at 1.

That Magna Carta and all subsequent documents that secured our liberties are relevant to the American Citizen today is born out by the fact that the single monument on the meadow of Runnymede, between Windsor and Staines, commemorating Magna Carta was de-

signed, paid for and erected by the American Bar Association. The American People never consented to this unapportioned direct tax on their wages and salaries. Therefore the Commissioner is wholly without any delegated authority whatsoever to collect such a tax within the several States.

III. This Court has previously ruled and affirmed that there is no Sixteenth Amendment exception to the direct taxation clauses of the Constitution.

This issue was presented squarely to this Court in the following cases: Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916); Tyee Realty Co. v. Anderson, 240 U.S. 115 (1916); Thorne v. Anderson, October term 1915, No. 394 (24,613); Dodge v. Osborn, 240 U.S. 118 (1916); and Stanton v. Baltic Mining Co., 240 U.S. 103 (1916). Mr. Brushaber, Tyee Realty Co. and Mr. Thorne all had the same attorney, a Mr. Julian Davies from New York City of the law firm Davies, Tolles, Glenn and Schurick. Mr. Davies asserted in his brief in each of these cases as follows:

> "The effect of the Sixteenth Amendment was merely to waive the requirement of apportionment among the States, in its application to a general and uniform tax upon incomes from whatever source derived...
>
> The evident purpose of this amendment was not to abandon the former policy of safeguarding the several sections of the Union against disproportionate taxation, but merely to substitute an apportionment according to incomes 'from whatever source derived,' in lieu of a *per capita* apportionment." Br.for appellant at 9-11, Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916).

In other words, according to Brushaber, the income tax was still a direct tax. Only the criteria for apportionment changed. Apportionment was now alleged to be based on incomes instead of the *per capita* apportionment originally required by the Constitution. In its *amicus curae* brief, the government argued a similar position:

> "(b) Apportionment being restricted to *direct* taxes *only* (*Flint v. Stone Tracy Co., supra* 152), the Sixteenth Amendment, in removing that restriction, recognized *any* tax upon income 'from whatever source derived' as a *direct* tax, and as such subject to the apportionment rule unless specially exempted." Br. for the

United States at 11-12, Brushaber v. Union Pac. R.R. Co., *supra*.

So both Brushaber and the government argued that an income tax on dividends from corporate stock was still a direct tax but now did not have to be apportioned among the several States according to population. This Court said they were both wrong. This Court ruled that the tax in *Brushaber* was inherently an indirect tax and that the Sixteenth Amendment prevented the Court from "taking an excise [tax] out of the class [of indirect taxes] to which it belongs and transferring it to a class [of direct taxes] in which in cannot be placed consistently within the requirements of the Constitution." *supra* at 19. Furthermore, the Supreme Court ruled that neither Brushaber nor the government could be right without destroying the harmony of the Constitution.

> "[t]he contention that the Amendment treats a tax on income as a direct tax, although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation..." *supra* at 18.

The position of this Court, that direct taxes levied without apportionment are not sanctioned by the Sixteenth Amendment, was affirmed by this Court in *Tyee Realty Co. v. Anderson* and *Thorne v. Anderson*. Tyee Realty Co.'s Counsel of Davies, Tolles, Glenn and Schurick, argued: "The Sixteenth Amendment authorizes a direct tax without apportionment only in so far as that tax is on income." Brief for Appellant at 12, Tyee Realty Co. v. Anderson, *supra*. In the *Thorne v. Anderson Case*, the same law firm claimed: "Although one of the great limitations upon the power of Congress to levy direct taxes has been abrogated by the Sixteenth Amendment." Brief for Plaintiff at 38, Thorne v. Anderson, *supra*. Of this contention, this Court ruled: "But we need not now enter into an original consideration of the merits of these contentions because each and all of them were considered and adversely disposed in the *Brushaber v. Union Pacific R.R. Co. Case*." Tyee Realty Co. v. Anderson, *supra* at 117. In other words, there is no Sixteenth Amendment exemption to the direct taxation clauses of the original Constitution.

Double checking this conclusion we can go to the Transcript of Record for the *Stanton v. Baltic Mining Co. Case.* Although *Brushaber* was the precedent setting case for the first income tax cases that went up to this Court after the ratification of the Sixteenth Amendment, the *Stanton Case* is more interesting to our point.

A review of this Court's Transcript of Record for the *Stanton Case* shows that 12 times Stanton claimed the Sixteenth Amendment provided this "apportionment rule exception" for direct taxes in the nature of an income tax. Then another 10 times Stanton alluded to this perceived exception. In addition, so did a Mr. John R. Van Derlip who filed an *amicus curiae* brief in the *Stanton Case*. The "exception to apportionment" argument was a central argument in both these briefs. The government and Mr. Van Derlip made the same claim 15 times. A sampling of Stanton's assertions is as follows:

> "The Sixteenth Amendment authorizes direct taxes upon 'incomes,' but not upon capital or property. Income taxes may now be imposed without regard to apportionment among the States, according to their population.
>
> All forms of direct taxation other than taxes on 'incomes,' clearly remain subject to the same constitutional limits as formerly." Brief for Appellant at 24, Stanton v. Baltic Mining Co., 240 U.S. 103 (1916).

> "This is a direct tax on 'net income,' and nothing else can constitutionally be taxed directly, without apportionment." *id.* at 36.

> "The Sixteenth Amendment only authorizes direct taxes on 'incomes.'" *id.* at 60.

> "All forms of direct taxation of real and personal property, other than income taxes, still require apportionment; otherwise they are unconstitutional." *id.* at 139.

In Mr. Van Derlip's *amicus curiae* brief, he claimed:

> "By the [Sixteenth] Amendment, sec. 2 of Article I of the Constitution had been modified as respects the persons to be included in any enumeration which should be the basis for the laying of a direct tax. This same section has now been modified for a second time by the Sixteenth Amendment with the result

that the first sentence of the section, in effect, now stands as if enacted in the following words: 'Representatives and direct taxes shall be apportioned among the several states [sic] which may be included within this Union, according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed; provided, however, that the Congress shall have power to lay and collect direct taxes upon incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.'" *Amicus Curiae* Brief by Van Derlip at 24-25. Stanton v. Baltic Mining Co., *supra.*

"The situation presented by the Sixteenth Amendment may be thus summed up:

1.) Income is the gain or profit derived from labor, or from property, or from both, and, if from property, it can only be that which is produced by its use without impairing the capital investment and which leaves such investment intact.

2.) Gains, profits and income are property which, before the adoption of the Sixteenth Amendment, could not be taxed except in accordance with the rule of apportionment, because an income tax is a direct tax.

3.) The Sixteenth Amendment does not change the nature of the income tax; it still remains a direct tax.

4.) By the Sixteenth Amendment, however, a new rule introduced into the Constitution where by a direct tax may now be assessed upon incomes without apportionment.

5.) No other change was effected by the Amendment, and, as to taxation of all classes of property other than incomes, the original constitutional limitations still obtain." *id.* at 71-72.

Every quote just cited from the *Stanton* Transcript of Record was rejected by this Court. In every way, shape and form the claim was made that the Sixteenth Amendment provided an exception to the apportionment rule. If true, this would have been the "new rule" spoken of in the *Stanton Opinion*. All this was rejected by this Court. In this Court's Opinion on the *Stanton Case*, this Court said:

"But aside from the obvious error of the proposition intrinsically considered, it manifestly disregards the fact that by the previous ruling [Brushaber] it was settled that the provisions of the

> Sixteenth Amendment conferred no new power of taxation but simply prohibited the previously complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income derived." Stanton v. Baltic Mining Co., *supra*.

An income tax on the severable net income from business or accumulated wealth is an indirect tax. An income tax on the earned income from the wages or salary of an American Citizen is a direct tax. The government is wholly without power to collect the latter without apportionment among the several States.

Reporting on "The Revenue Bill of 1941" the House's Committee on Ways and Means prepared House Report No. 1040 dated July 24, 1941. On page 17 of this report, in the section called *Constitutionality of Proposal*, the Committee on Ways and Means stated:

> "It seems clear that Congress has the constitutional power to enact this proposed amendment. Generically an income tax is classed as an excise [emphasis Hart's] (*Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1). The only express constitutional limitation upon such taxes is that they be geographically uniform." H. Rep. No. 1040, at 17 (1941).

Twenty-eight years after the ratification of the Sixteenth Amendment, we have the House of Representatives' Committee on Ways and Means asserting that the income tax is an *excise tax*, which is a species of an *indirect tax*.

Buttressing our conclusion that the Sixteenth Amendment does not provide authority for an unapportioned direct tax on the labor of an American Citizen living and working in the several States, we go to Harvard Law Review's commentary on the *Brushaber Case*:

> "In *Brushaber v. Union Pac. R.R. Co.*, Mr. Chief Justice White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that an income tax is 'indirect,' rather than as making an exception to the rule that direct taxes must be apportioned." The Income Tax and the Sixteenth Amendment, 29 Harvard Law Review 536 (1915-6).

Cornell Law Quarterly simplifies what this Court said in *Brushber*:

> "The contention of the appellant was as follows:
>
> (1) The Sixteenth Amendment provided for a new kind of a direct tax, a tax on incomes from whatever source derived.
>
> The court, through Chief Justice White, held that the tax [in Brushaber] was constitutional. The major proposition of the appellant's argument is not true. Hence, the conclusion does not follow. The sixteenth amendment [sic] does not permit a direct tax, (in fact as it will later be shown, the court does not think that the amendment treated the tax as a direct tax at all), carrying with it the distinguishing characteristic of a hitherto unrecognized uniformity.
>
> The amendment, the court said, judged by the purpose for which it was passed, does not treat income taxes as direct taxes but simply removed the ground which led to their being considered as such in the Pollock case, namely, the source of the income. Therefore, they are again to be classified in the class of indirect taxes to which they by nature belong." Ramon Siaca, The Federal Income Tax Law of 1913: Construction of the Sixteenth Amendment, 1 Cornell Law Quarterly 298, 299 and 301 (1916).

Said another way, the theory upon which the *Pollock Case* was decided was overturned by the Sixteenth Amendment. See also Constitutional Law: Income Tax: Sixteenth Amendment, 4 California Law Review 333, 335-6 (1915-6), and Washington Notes, The Income Tax Decision, 24 The Journal of Political Economy 299, 300 (1916).

In 1916, the *New York Times* wrote of the *Brushaber Case:*

> "The basic error of those who attacked the constitutionality of the tax, Chief Justice White holds... was in regarding the Sixteenth Amendment as empowering the United States to levy a direct tax without apportionment among the States according to population. In substance, the court holds that the Sixteenth Amendment did not empower the Federal Government to levy a new tax...
>
> We are of the opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the Sixteenth Amendment provides for a hitherto unknown power of taxation: that is, a power to levy an income tax which, although direct should not be subject to the regulation of apportionment appli-

cable to all other direct taxes." Income Tax Upheld In Broad Decision, N.Y. Times, p. 5, January 25, 1916.

In the early income tax cases of *Brushaber, Stanton, Tyee, Dodge* and *Thorne* this Court ruled correctly. This Court had to rule as it did because the legislative record, the historical record and the will of the American People were necessarily relied upon as the foundation for this Court's position on the question.

The Constitution mandates that Congress keep a journal which shall be made available to the public. "Each house shall keep a journal of its proceedings, and from time to time publish the same." U.S. Const. art. I, sec. 5, cl. 3. This was a requirement of the framers because they acknowledged that the American system of government was based on a delegation of power, the ultimate sovereignty being the American People. It was therefore necessary that the American People have a record of Congress' proceedings available to them.

The Sixteenth Amendment, written by Senator Brown of Nebraska, originated in the Senate Finance Committee and was exhaustively debated by the Senate. The House only debated it for three to four hours. The Sixteenth Amendment was called Senate Joint Resolution #40 as it moved through Congress for Congress' approval. It had a predecessor known as Senate Joint Resolution #39, also written by Senator Brown, which read:

> "The Congress shall have power to lay and collect *direct* [emphasis Hart's] taxes on incomes without apportionment among the several States according to population." 44 Cong. Rec. 3377 (1909).

The immediate response to S.J.R. #39 was criticism from Senator Mr. Laurin who stated:

> "I think if the Senator from Nebraska will change his amendment to the Constitution so as to strike out the words 'and direct taxes' in clause 3, section 2, of the Constitution, and also to strike out the words 'or other direct' in clause 4 of section 9 of the Constitution, he will accomplish all that his amendment proposes to accomplish and not make a constitutional amendment for the enacting of a single act of legislation." *id.* at 3377.

When S.J.R. #39 was replaced by S.J.R. #40, which ultimately

became the Sixteenth Amendment, the term "direct taxes" was replaced with only "taxes." There is more. S.J.R. #39 had its own predecessor known at S.J.R. #25 which proposed to amend the Constitution and read as follows: "The Congress shall have power to lay and collect taxes on incomes and inheritances." (*id.* at 1568) This proposed amendment was also introduced by Senator Brown from Nebraska. As in S.J.R. #39, the very next statement made after the introduction of S.J.R. #25 was from Senator Rayner of Maryland who raised the issue of harmony with the direct taxation clauses of the Constitution. Senator Rayner stated:

> "I will call the Senator's attention to the fact that unless you change the clause of the Constitution which provides for apportionment [of direct taxes] the joint resolution would not repeal that clause. The two clauses would stand *in pari materia* together and you would still have an apportionment." 44 Cong. Rec. 1568-9 (1909).

The evidence that direct taxes are without the authority of the Sixteenth Amendment is overwhelmingly compelling. The Senate voted on the Sixteenth Amendment (S.J.R. #40) at 1 o'clock on July 5, 1909. Senator Aldrich had earlier tried to ram it through the Senate on Saturday, July 3rd, a holiday weekend, for an immediate vote without debate when only 52 senators were present. A few senators protested and the vote was set for the following Monday. During the debate on July 3rd, several amendments were proposed to S.J.R. #40 that came up for a vote at the appointed hour of 1 PM Monday, July 5, 1909.

An amendment by Senator Bailey of Texas was offered to add the language "and may grade the same" to modify the term "income tax" as a way to provide that the tax may be graduated. Bailey proposed this language on Saturday, July 3rd. By Monday, July 5th, when this came up for a vote, Bailey realized it would fail and tried to have it withdrawn. Bailey wanted it withdrawn because, according to Bailey:

> "Mr. President, I am satisfied that this amendment will be voted down; and voting it down would warrant the Supreme Court in hereafter saying that a proposition to authorize Congress to levy a graduated income tax was rejected." 44 Cong. Rec. 4120 (1909).

In other words, Senator Bailey understood that once Congress rejected a particular provision while amending the Constitution, Congress would be forever bared from implementing that provision by way of statute in the future.

There also was an amendment by Senator McLaurin of Mississippi. After a long discussion by him about direct taxes, Senator McLaurin proposed this amendment to S.J.R. #40 as follows:

> "The SECRETARY. Amend the joint resolution by striking out all after line 7 and inserting the following: The words 'and direct taxes' in clause 3, section 2, Article I, and the words 'or other direct,' in clause 4, section 9, Article I. of the Constitution of the United States are hereby stricken out." 44 Cong. Rec. 4109 (1909).

The Senate rejected this, as this amendment failed by voice vote. Had it passed, it would have provided authority for a species of income tax that was inherently a direct tax to be levied without apportionment.

Lastly there was an amendment by Senator Bristow of Kansas to replace S.J.R. #40 with S.J.R. #39. S.J.R. #39 read: "The Congress shall have the power to lay and collect *direct* [emphasis Hart's] taxes on incomes without apportionment among the several States according to population." *id.* at 4120-1.

This substitute amendment also included a provision to elect senators by popular vote. After some debate this was also rejected by voice vote. The election of Senators by popular vote was soon thereafter approved by the 17th Amendment. Therefore this instant amendment failed because of the direct tax provision.

Next, S.J.R. #40 was voted on and passed 77 to 15. We can conclude that the Senate understood it was the practice of this Court to look at the proceedings of Congress to see what the intent of Congress was. If Congress voted on a measure and rejected it, then this Court would interpret that vote as a clarification of the intent and purposes of Congress.

> "One of the most readily available extrinsic aids to the interpretation of statutes is the action of the legislature on amendments which are proposed to be made during the course of consideration in the legislature. Both the state and federal courts will refer to proposed changes in a bill in order to interpret the statute

as finally enacted. The journals of the legislature are the usual source for this information. Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment." Sutherland on Statutory Construction, sec. 48.18 (5th Edition).

"It is plain, then, that Congress had this question presented to its attention in a most precise form. It had the issue clearly drawn. The first alternative was rejected. All difficulties of construction vanish if we are willing to give to the words, deliberately adopted, their natural meaning." U.S. v. Pfitsch, 256 U.S. 547, 552 (1921).

Alabama was the first state to ratify the Sixteenth Amendment. On August 3, 1909 the New York Times reported on its passage in the Alabama House of Representatives. Quoted in the New York Times article was debate on whether or not the Sixteenth Amendment would "affect salaries."

"Col. Sam Will John...of Birmingham... represented that it would not." Income Tax Voted on in Alabama House , N.Y. Times, p. 1, August 3, 1909.

The New York Times is a newspaper of record and read throughout the country. It would have alerted people throughout the country as to this fact as they considered passage of the Sixteenth Amendment. As the first state to ratify the Sixteenth Amendment, Alabama set a precedent taking the position that salaries were outside the scope of the Sixteenth Amendment.

The income tax amendment was a Democrat Party idea. The amendment was proposed in 1909. The purpose of the Sixteenth Amendment can best be summed up with the plank from the 1908 Democrat Party Presidential Platform which states:

"We favor an income tax as part of our revenue system, and we urge the submission of a constitutional amendment specifically authorizing Congress to levy and collect a tax upon individual and corporate incomes, to the end that wealth may bear its proportionate share of the burdens of the Federal Government." 44 Cong. Rec. 3309 (1909).

This platform plank was repeatedly quoted during the Congressional debates on the Sixteenth Amendment. The intent of the Six-

teenth Amendment was to bring tax relief to those who were wage-earners and who paid out a high percentage of their yearly earnings to taxes on consumption. Senator Brown, author of the Sixteenth Amendment wrote an article entitled Shall the Income Tax Amendment be Ratified, which appeared in *The Editorial Review* and can be found at Senate Document No. 705, 61st Congress, 3d Session (1910). Senator Brown tells us on page 7 of this article what he intends to be taxed by the Sixteenth Amendment and no mention is made of placing a direct tax on the labor of the American People.

> "The growing objection to the tax on consumption is vitalized by the fact that such a tax discriminates against those least able to pay the tax and in favor of those whose ability to pay the tax is unquestioned and whose protection from the Government is so much greater because their larger property requires and receives a larger measure of protection. When the Government seeks to lay a tax for its defense or its support on the incomes of the country, it should reach all incomes. If the income arises from an investment in lands, it should be taxed; if it arises from investments in manufacturing enterprises, in railroads, in banks, in newspapers, in the mercantile business, or in steamship lines, it should be taxed."

Brown's entire argument dealt with taxing income from property, either real or personal. The totality of Senator Brown's argument focused on the very items that were at issue in the *Pollock Case*. The entire purpose of the income tax amendment was to bring tax relief to those who earned wages and paid a greater proportion of their earnings in taxes under the tariff system (tax on consumption). This tax relief would be gained by shifting the tax burden onto the income from the accumulated wealth and investments of the country.

IV. The Tax Court and the Ninth Circuit erred in relying on *Abrams v. Commissioner* in deciding this case against Hart.

Abrams v. Commissioner, *supra* states in pertinent part at page 407, "Since the ratification of the Sixteenth Amendment, it is immaterial with respect to income taxes whether the tax is a direct or indirect tax."

The Commissioner's claim that this Court authorized a direct tax on wages and salaries without apportionment with this Court's *dicta*

in the *Eisner Case, Stratton Case* and *Doyle Case* is wholly without foundation. A review of this Court's Transcript of Record for these cases reveals that these cases had nothing to do with the issue of an unapportioned direct tax on the labor of the American People. Such a question was never put before this Court in any of these cases. It was never argued. There was no evidence submitted either for or against such an argument. It was a non-issue.

In defense of this unapportioned direct tax the government claims that this Court determined, "Income may be defined as the gain derived from capital, from labor, or from both combined." Eisner v. Macomber, 252 U.S. 189, 207 (1919).

The origin of this quote was from the case of Stratton's Independence v. Howbert Ltd., 231 U.S. 399 (1913) at page 415. This quote also appears in the case of Doyle v. Mitchell Brothers Co., 247 U.S. 179 (1918) at page 185. All these cases involved corporations. A typical corporation combines many elements into a larger economic organism. If well managed, profits will be generated yielding income to the investors. Labor is an element making up this greater whole. Some corporations will use more labor than capital and others more capital than labor. This Court was correct in stating that it was also possible for a corporation to generate income utilizing only capital or only labor. As long as corporations utilize any human labor at all, these business will, if well managed, derive income from labor. A tax on this income will diminish only the net income of the corporation, it will leave the laborer alone. Such an income tax as authorized by the Sixteenth Amendment is an indirect tax regardless of whether or not the business, whose income is taxed, is an incorporated or an unincorporated business. The income that is the subject of the tax is net income from business and personal property.

Net income earned by a business enterprise on the wages of its wage-earners is income taxable by the Sixteenth Amendment. Wages earned by the wage-earners is not income taxable by the Sixteenth Amendment.

Stratton and *Doyle* were about corporate profits. *Eisner* was about stock dividends. None of them had anything to do with the "are wages income?" question. This question was never before this Court and is a wholly different issue than that of income taxes on corporate profits.

So, if the *Stratton, Doyle* and *Eisner v. Macomber Cases,* all

dealing with corporations, had nothing to do with the "wages are income" question, then these cases have not settled the "are wages income" question. The question has never been settled.

CONCLUSION

The conclusion therefore follows:

1. That all the relevant authorities at the time the Constitution was drafted and ratified recognized that a tax on the wages or salary of a person was a capitation tax—a species of direct tax.

2. That there is no "income tax exception" to the direct taxation clauses of the Constitution.

3. That no tax may be imposed upon the American People unless the People have consented to that tax.

4. That the tax the Commissioner is attempting to collect on the earned income of Hart is an unapportioned direct tax not authorized for collection within the several States by the Constitution.

5. That the Commissioner is operating outside of his constitutional authority when attempting to collect such a tax from Hart and that the Tax Court and the Ninth Circuit are have ruled in error.

The habit of government of exceeding its authority in the collection of taxes is as old as history itself. All the milestones in the progress of liberty and self government for the Anglo-American people were proceeded by abusive taxation, civil unrest, sometimes civil war or revolution, culminating with memoralized documents whereby the Citizens compel the government to obey the law.

In the process of framing our Constitution, that instrument would likely never have been ratified without the direct taxation compromise between the large states and the small states.

The requirement of apportioning direct taxes among the several States is the only provision of the Constitution that appears twice in the document. It is this very provision that is today being abused by the Commissioner. This Court should adjudicate this case so that this question can finally be settled.

Respectfully Submitted,
Philip Lewis Hart
Counsel of Record in propria persona

No. _____

In the
Supreme Court of the United States
October Term, 2001

Philip Lewis Hart,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Appendix

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Appendix A

Ruling on Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED: January 9, 2002
Cathy A. Catterson, Clerk,
U.S. Court of Appeals

No. 01-70173
U.S. Tax Ct. Nos. 10398-98
16155-98

Philip Lewis Hart,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

Before: KOZINSKI, T.G. NELSON and TALLMAN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition en banc are denied.

Appendix B

Petition for Rehearing En Banc

In the United States Court of Appeals
for the Ninth Circuit

No. 01-70173 Lower Court No. 10398-98

Philip Lewis Hart
Petitioner - Appellant,
v.

Commissioner of Internal Revenue
Respondent - Appellee.

On Appeal from the Decision of the United States Tax Court

Appellant's Petition for Rehearing En Banc

To the Honorable
United States Court of Appeals for the Ninth Circuit

The Panel decision on the above captioned case conflicts with prior Supreme Court of the United States precedent, conflicts with the Legislative intent and Legislative history and conflicts with the intent of the American People. The Panel's decision also violates the principles of Due Process as Hart's claims were adequately supported by competent authorities and never rebutted by the Appellee.

Issue #1. The Panel's decision violates the principle of Due Process.

On the question of Due Process, Federal Rule of Civil Procedure Rule 8 (d) requires: "Averments in a pleading to which a responsive pleading is required... are admitted when not denied in the respon-

sive pleading."

Hart made and substantiated the following claims in his opening brief:

"The purpose of the Sixteenth Amendment was to bring tax relief to wage earners who were suffering under high prices for consumer goods as a result of high tariffs. The goal of the Sixteenth Amendment was to overturn the *Pollock Case* and thereby allow a tax on the net income from real estate and personal property to be levied as an indirect tax without resorting to the source from which the income was derived in determining whether the tax was a direct tax or an indirect tax." Br. of Appellant at 3.

And at page 23 Hart wrote, "It is abundantly clear that the purpose of the Sixteenth Amendment was to shift a portion of the tax burden from those Citizens who spent virtually all the money they worked for on consumption to those who had income from accumulated wealth."

Relying on Adam Smith, author of *Wealth of Nations*, Hart claimed:

> "Capitation taxes, so far as they are levied upon the lower ranks of people, are direct taxes upon the wages of labour." Smith, Adam, *Wealth of Nations*, book V, 541 (Prometheus Books, Amherst, New York 1991)(1776), Br. of Appellant at 8.
>
> "The Supreme Court of the United States has ruled that the 16th Amendment does not provided an exception to the apportionment rule for taxes on incomes. The 16th Amendment therefore only provides authority for taxes on incomes when those taxes are by their nature 'inherently' indirect." Br. of Appellant at 10.
>
> "There is no Sixteenth Amendment exemption to the direct taxation clauses of the original Constitution." Br. of Appellant at 12.
>
> "The government regularly claims they have this authority

[to levy an unapportioned direct tax on wages and salaries] by falsely claiming these early cases [*Brushaber* and the cases bundled with *Brushaber*] settled the question in the government's favor." Br. of Appellant at 13.

"The question as to whether there is authority for the government to collect an unapportioned direct tax was settled in the negative by the Supreme Court... An income tax on the earned income from wages and salaries on an American Citizen is a direct tax. The government is wholly without power to collect the latter without apportionment among the several States." Br. of Appellant at 15.

Hart also claimed:

"The idea that the American People during the period from 1909 to 1913, when the 16th Amendment was debated and purportedly ratified, chose to reduce indirect taxes on their consumption in exchange for direct taxes on their labor is unsupported by any evidence whatsoever." id. at 25.

"The government's claim that the Supreme Court authorized this tax [a direct tax on wages and salaries, now called an income tax] with their dicta in the *Eisner Case*, *Stratton Case* and *Doyle Case* is wholly without foundation." id. at 25.

"The conclusion therefore follows that there is no evidence to support the claim that the American People consented to an unapportioned direct tax on the labor of a Citizen working in the private sector in one of the several States of the Union. If the American People did not consent to an unapportioned direct tax, then the government is without authority to levy one." id. at 27-28.

"In this research no evidence was found that supports the claim that when the Supreme Court wrote that corporations 'derived income from labor' that that meant a wage-earner's wage was income within the meaning of the 16th Amendment. On the contrary, all the evidence shows that those involved in

> the 16th Amendment debate understood that the income to be taxed under the 16th Amendment was net income from unincorporated businesses and passive income from accumulated wealth. Wages and salaries are without the constitutional definition of 'income.'" id at 28.

These claims by Hart are based on several thousand hours of personal research. Hart has visited many law libraries including that of the Supreme Court and the Library of Congress. See Brief of Appellant at 28 and Reply Brief at 13. The Appellee's response to these claims of Hart's was to quote other cases where a court ruled contrary to Hart's claims. But the Appellee failed to rebut Hart's claims with equally authoritative source documents. Hart knows that it would be impossible for the Appellee to do so because such evidence doesn't exist. If it existed, Hart's research would have found it. Hart's claims therefore stand unrebutted.

If a particular litigant had limited time, money, intellect, ambition and as such did a poor job in pursuing his case, does that mean that someone with more resources or desire is forever bared from revisiting a previously ruled on question?

Are all Americans bound by either the good or bad litigation on other Americans? The answer is self-evident for a self-governing people. Such a notion flies in the face of the concept of individual rights, liberties and responsibility. The law of a case is just that, the law of the case. Due process requires that each Citizen have the opportunity to bring his controversy to the courts. If the facts and authorities are identical in subsequent cases as in earlier cases, than Hart can agree that pursuing litigation in the latter case would be a waste of judicial resources. But certainly Due Process provides that a Citizen should be able to bring new information and new authorities before the courts. This is precisely what Hart has done. To Hart's knowledge, the specific arguments and authorities relied on by Hart have not been relied on by any other litigant in any other tax case in any court. Hart is confident of this statement because the authorities and evidence upon which Hart relied were dug out of the historical records by Hart himself and do not appear in any of

the contemporary literature on the issue of income taxes.

When the Panel issued its Memorandum against Hart, the Panel cited three cases. The first case was that of *In Re Becraft*, 885 F.2d 547 (9th Cir. 1989). The attorney in this case, Mr. Becraft, is a personal friend of Hart's, and Hart has regular contact with him. Hart knows from personal first hand knowledge that Becraft's arguments and evidence were far different than what Hart argued in his opening brief and reply brief to the Ninth Circuit. Becraft primarily argued jurisdiction and jury instructions; Hart argued the historical intent of the 16th Amendment. Hart knows from first hand experience that Becraft has up until recently been unaware of Hart's authorities and evidence. *In Re Becraft* is simply not authoritative in the instant case.

The second case cited by the Panel was Grimes v. Commissioner, 806 F.2d 1451 (9th Cir. 1986). The Court's opinion in this case repeatedly stated that Grimes argued that he was not subject to federal income taxes because he was "constitutionally entitled to an exemption for expenditures to provide his family with the 'American Standard of a 'good living'". Such language is obviously very simplistic and unscholarly. It is offensive to Hart to have Hart's exhaustive, credible and well briefed work dismissed by the Panel because someone like Grimes brought his simplistic argument to the court first. In reality there is no comparison between the intellectual content of the *Grimes Case* and that of the instant case. *Grimes* is therefore not authoritative in the instant case.

The third and final case the Panel cited was that of Olson v. United States, 760 F.2d 1003 (9th Cir. 1984). Prior to Hart filing his opening brief with the Ninth Circuit, Hart read the Appellate Briefs in this case. Since the Panel issued their Memorandum in the instant case, Hart has read the original complaint filed by Olson in the District Court in Alaska. Here again the argument that Olson made was entirely different from that of Hart's. Olson's primary focus was on the jury instructions of the case and on statutory authority. Hart's argument in the instant case focuses on the intent of the American People in adding the 16th Amendment to the Constitution. The *Olson Case* is therefore not authoritative in the instant

case. Did Olson, who lived in Alaska, visit the law libraries of the Supreme Court and the Library of Congress? It is doubtful that he did. If Olson did a poor job litigating his case, should Hart be bound by Olson's case? The self-evident answer is No.

Therefore, Hart's claims are to be treated as admissions since they were not rebutted.

> "The allegations are to be treated as admitted since not denied." Legal Aid Society of Alameda County v. Brennan, 608 F.2d 1319, 1334 (9th Cir. 1979). See also Sun-Maid Raisin Growers Association v. Neustadter Bros., 115 F.2d 126, headnote 1 (9th Cir.1940).

Conclusion on issue #1. Because Hart brings new evidence and new authorities to this controversy, prior case law has no standing because there are no cases to be found anywhere that argued what Hart has argued. Since Hart based his argument on original source documents, Due Process and fairness dictate that the Appellee should be compelled to rebut Hart by also using source documents, not imperfectly argued case law. This Court should compel the Appellee to rebut Hart's claims using original source documents. With the resources of the Appellee, it would certainly be an easy task to pull a few files and produce the evidence. Therefore, the Appellee should have, yet failed to, rebut with contrary evidence any of the claims that Hart made.

Issue #2. (Omitted from this appendix)

Truth is truth. Truth is self-confirming; it does not need judicial confirmation. In the American system of self-government, the idea that there must be consent from We the People before an unapportioned direct tax can be laid on the wages and salaries of the American People is self-evident. The truth is there exists no evidence to show that the American People ever consented to this unapportioned direct tax that the Appellee is trying to collect from the Appellant.

Respectfully submitted on this 12th day of September, 2001.

Philip Lewis Hart, in propria persona

Appendix C

Decision of the Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED: July 31, 2001
Cathy A. Catterson, Clerk,
U.S. Court of Appeals

No. 01-70173
U.S. Tax Ct. Nos. 10398-98
16155-98

Philip Lewis Hart,
Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Appeal from the United States Tax Court
Submitted July 19, 2001

Before: KOZINSKI, T.G. NELSON AND TALLMAN, Circuit Judges.

MEMORANDUM

Taxpayer Philip Lewis Hart appeals pro se the Tax Court's decision holding him liable for income tax deficiencies and penalties, and imposing sanctions against him under Internal Revenue Code § 6673 for bringing frivolous proceedings.

The Tax Court properly determined that Hart's wages and other income are subject to federal income tax, *In Re Becraft*, 885 F.2d 547, 548 (9th Cir. 1989); *Grimes v. Commissioner*, 806 F.2d 1451, 1453 (9th Cir. 1986)(per curiam), and that he was liable for additions to tax and accuracy-related penalties and sanctions pursuant to 26 U.S.C. §§ 72(t), 6651(a)(1), 6654, 6662(a) and 6673.

We grant the Commissioner's request for sanctions pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1912 in the amount of $2,000 because the result is obvious and Hart's appeal is wholly without merit. *Olson v. United States*, 760 F.2d 1003, 1005 (9th Cir. 1984).

AFFIRMED WITH SANCTIONS.

Appendix D

Appellant's Opening Brief on Appeal to the Ninth Circuit

In the United States Court of Appeals
for the Ninth Circuit

No. 01 - 70173 Lower Court No. 10398-98

Philip Lewis Hart
Petitioner - Appellant,

v.

Commissioner of Internal Revenue
Respondent - Appellee.

On Appeal from the Decision of the United States Tax Court

Brief of Appellant

Statement of Jurisdiction

On or about March 13, 1998 the Commissioner sent to Hart a purported Notice of Deficiency for the years 1994 and 1995. On or about July 31, 1998 the Commissioner sent to Hart another purported Notice of Deficiency for the year 1996. In accordance with 26 U.S.C. 6212 and 6213 Hart filed timely Petitions to the Tax Court on June 4, 1998 and September 29, 1998 respectively. The two cases were consolidated and there was a hearing held in Spokane, Washington on June 7, 1999.

The Tax Court entered its Decision on November 2, 2000. An "entered" decision is an appealable decision according to Tax Court Rule 190 (a). Hart then filed a timely Notice of Appeal to the United States court of appeals for the Ninth Circuit 26 U.S.C. 7482 (b) (1) on January 26, 2001 in accordance with 26 U.S.C. 7482 and Tax Court Rule 190 (a) and Fed. R. App. P. 13 (a) (1), which gives 90 days to file such notice.

Statement of the Issues

Issue #1: Whether the Tax Court erred in its reliance on Abrams v. Commissioner, 82 T.C. 403 (1984) which stated at page 407, "Since the ratification of the 16th Amendment, it is immaterial with respect to income taxes whether the tax is a direct or indirect tax."

Issue #2: (Omitted from this appendix)

Statement of the Case and Facts

The relevant facts may be summarized as follows:

Appellant Hart makes his living in the private sector as an engineer and is a Citizen of one of the several States of the Union. Petitioner has never lived anywhere outside of these several States, nor has Hart ever been an employee of any government nor its instrumentalities. Consequently, Hart has been for his entire life an Inhabitant of the several States. (Br. for Pet'r pgs. 1-3., Excerpts of R. pgs. 37-9.) After thousands of hours of studying and research, Hart has determined that any tax levied by Congress upon his labor, which tax Hart must pay, is a direct tax and is required by the Constitution to be apportioned among the several States. (Br. for Pet. at 9-10., Excerpts of R. pgs. 45-6.) Said another way, there is no exemption to the constitutional rule of apportionment for direct taxes levied on Citizens of the several States.

Hart has received two purported notice of deficiencies from the Commissioner/Appellee. The first was for the years 1994 and 1995 and the second was for 1996. In the first Notice of Deficiency (for 1994 and 1995) the Commissioner claims that Hart had "taxable income" of $29,674 and $38,781 upon which an income tax, actually an addition to tax and penalties, was due in the amount of $6,422 and $9,810. The second notice of deficiency attempts to collect an addition to tax plus penalties of $16,286 for an early withdraw of money from an IRA account. All monies that Hart placed in this account were monies that Hart earned from his labor.

Realizing that Congress's ability to levy and collect an unapportioned direct tax was limited to specific geographical areas and districts and/or specific classes of persons, none of which included Hart, Hart sought a refund of monies mistakenly paid to the Commissioner for the year 1994. Hart has not given the Commissioner any money for 1995 or 1996. As noted earlier, the case has been to the United States Tax Court and is now on appeal to the United States court of appeals for the Ninth Circuit, 26 U.S.C. 7482 (b) (1).

Summary of Argument

Issue #1: Taxes which diminish earned income from La-

bor are Direct Taxes. There is no exemption to the Constitution's apportionment rule for Direct Taxes levied on Citizens of the several States.

The purpose of the Sixteenth Amendment to the Constitution was to bring tax relief to wage earners who were suffering under the high prices for consumer goods as a result of high tariffs. The goal of the Sixteenth Amendment was to overturn the *Pollock Case* and thereby allow a tax on the net income from real estates and personal property (stocks, bonds, businesses and other investments) to be levied as an indirect tax without resorting to the source from which the income was derived in determining whether the tax was a direct tax or an indirect tax. The purpose of the American People having granted to Congress the ability to place an unapportioned indirect tax on net incomes from business and accumulated wealth by authority of the Sixteenth Amendment was to shift a portion of the tax burden off of wage earners.

The question of whether the income tax of the Sixteenth Amendment was a direct tax or an indirect tax was placed directly before the Supreme Court of the United States. The Supreme Court ruled the income tax to be indirect, direct taxes being outside of the scope of that Amendment.

The issue was also placed squarely before the Congress and the Congress twice by vote declined to include direct taxes within the authority of the Sixteenth Amendment.

Hart, being an Inhabitant of one of the several States enjoys constitutional protections to his person and property. Congress must therefore apportion any direct tax for which Hart is liable.

Argument

Issue #1: Taxes which diminish earned income from Labor are Direct Taxes. There is no income tax exception to the Constitution's apportionment rule for Direct Taxes levied on Citizens of the several States.

In error the Tax Court relied on the case of *Abrams v. Commissioner* which held that: "Since the ratification of the 16th Amend-

ment, it is immaterial with respect to income taxes, whether the tax is a direct or indirect tax." Abrams v. Commissioner, 82 T.C. 403, 407 (1984). Hart objected to the conclusions of this specific case in his Reply of Mot. for Sanctions pp. 4 - 6, Excerpts of R. pp. 9 - 11 and in general in his Brief at pp. 8 - 9, Excerpts of R. pp. 44 -5. However, the Tax Court limited Hart's brief to ten (10) pages making it impossible for Hart to adequately address the issue. Hart objected to this ten page limitation at page 10 of his Brief and at page 2 of Objection to Resp't's Computation for Entry of Judgement, Excerpts of R. at p. 157. As this is a question of constitutional law, Hart requests a de novo review.

In his opening remarks during oral argument to the Supreme Court, Mr. W. D. Guthrie, attorney for the Appellants in the second *Pollock v. Farmers' Loan and Trust Co.*, stated:

> "If your honors please, no statute and no decision inconsistent with the Constitution can stand. A century of error cannot overrule the Constitution. The people are not to be deprived of rights imbedded in the Constitution by erroneous precedents. Those rights may slumber, but nevertheless they live and breathe. Where would we be today if the rule of precedent had controlled our forefathers? Is the Constitution to be enslaved by any such technical doctrine as *stare decisis*, and thus manacled with parchment chains? When Franklin stood at the bar of the English Commons ought he to have been satisfied to abandon the claims of the colonists because Mansfield, Thurlow, Eldon and Boston-born Copley could have demonstrated to him that precedent upon precedent fully sustained the right and the power of Parliament to tax the colonists without representation?" Opening argument for Appellant at 6 - 7, Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895).

This brief will argue issues already presented to this Court and to other circuit courts. Appellant has read the briefs to at least four cases which have presented similar arguments to the Ninth Circuit in an attempt of investigate the arguments, authorities and foundation of these other litigants. These cases include the often cited

cases of *Wilcox vs. C.I.R.*, 848 F.2d 1007 (9th Cir. 1988) No. 87-7312, *United States v. Romero*, 640 F.2d 1014 (9th Cir. 1981) No. 80-1096, *United States v. Buras*, 633 F.2d 1356 (9th. Cir. 1980) No. 80-1250, and *Olson v. United States*, 760 F.2d 1003 (9th Cir. 1985) No. 84-4030. This Appellant found in each of these cases that those who made the arguments, which are similar to this Appellant's, were either unscholarly, lacking in authorities or unpersuasive. See Pet'rs Reply to Mot. for Sanctions pp. 2 - 4., Excerpts of R. pp. 7 -9. As such, this Appellant feels compelled to quote from Mr. Choate, attorney for Appellant, in his closing oral argument in front of the Supreme Court in the second *Pollock Case.* Commenting on the strategic errors made by Mr. Springer in *Springer v. U.S.*, 102 U.S. 586 (1880), Mr. Choate said:

> "Now, I say that the exception, within that rule, was too broad, that he could not and did not, even before the Judge at Circuit, by that exception, raise the question whether, *as to his $161 of income from bonds*, the tax was a direct tax, much less did it point to any such question before the appellate tribunal, so as to either enable or require this Court to pass on that question. This Court had no right to decide such a question upon the exception taken, and he had no right to ask them to decide it. He waived his point, if he had one, **but Mr. Springer in waiving the point he had or might have had, cannot give away all the rights of all the people of America in other hearings before this Court."** (emphasis mine) Closing Argument for Appellant at 63, Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895).

In the same way, Wilcox, Romero, Buras, Olson, and others cannot give away all the rights of all the People of America in other hearings before the courts because they were ill-prepared in their research and arguments.

This Appellant does agree with the Ninth Circuit that income taxes that diminish one's earned income from labor are direct taxes. The Ninth Circuit has ruled as such, or has alluded to this point when the Court said:

> "The Sixteenth Amendment broadened the authority to tax without apportionment by including 'incomes from whatever source derived.' As to amounts received as alimony. 'It is income to spend, to live on, and save.'" Fairbanks v. Commissioner, 191 F.2d 680, 681 (9th Cir. 1951).

Romero in *U. S. v. Romero* supra. made similar claims that the Sixteenth Amendment did not authorize a direct tax of the source of the income itself, but only an indirect tax on the income that came from a source.

Since the Ninth Circuit ruled against Romero, his contention that the Sixteenth Amendment did not provide authority for an unapportioned direct tax was rejected. Most of the other circuits agree, believing that the Sixteenth Amendment provides an exception to the direct taxation clauses of the original Constitution. If such were the case, than a direct tax on labor would not have to comply with the apportionment rule of the Constitution. Similarly, the District Court said in U.S. v. Rhodes, 921 F. Supp. 261 (M.D. Penn. 1986):

> "Under the Sixteenth Amendment, an income tax may fall under the category of a direct tax or under the category of a duty, impost, or excise. In either case, the income is subject to taxation without apportionment, consistent both with the Sixteenth Amendment and Title 26."

In 1993, the Eighth Circuit said in United States v. Gerads, 999 F.2d 1255 at 1256:

> "We have rejected, on numerous occasions, the ... argument that the federal income tax is an unconstitutional direct tax that must be apportioned. Likewise we have held that wages are within the definition of income under the Internal Revenue Code and the Sixteenth Amendment, and are subjected to taxation.

In 1985 the Tenth Circuit said in Charczuk v. C.I.R., 771 F.2d 471 at 472:

> "Appellant argues that an income tax is a 'direct' tax and that Congress does not possess the constitutional authority to im-

> pose a 'direct' tax on him, since such tax has not been apportioned among the several States of the Union. ...In making his argument that Congress lacks constitutional authority to impose a tax on wages without apportionment among the States, the appellant has chosen to ignore the precise holding of the Court in *Pollock*."

While this Appellant agrees with all the above cited district and circuit courts that a tax on wages is a direct tax, it must be pointed out that the *Pollock Court* did not determine this to be the case nor did that court determine that it wasn't. The *Pollock Court* expressly stated it its dicta that taxes on employment were outside the scope of the *Pollock Case.* (See 158 U.S. 601, 637 (1895).)

The historical record confirms that taxes which diminish the earned income from labor are direct taxes. The leading authority on this issue at the time the framers wrote the Constitution was Adam Smith, author of Wealth of Nations, first published in 1776, eleven years before the writing of the Constitution. The terms "direct tax" and "indirect tax" were promoted by Mr. Smith and by Mr. Jacques Turgot of France, the two leading authorities on the subject at this time.

> "If the term 'direct taxes' had been used for the first time in the Constitution, and we could not, therefore, trace its source, much might be left to doubt and to surmise. A large majority of the Constitutional Convention were scholars, 35 of its members were college graduates, and the eight leaders of the great debate were all college men. Were they likely to use terms they did not understand? Had they never seen the term direct tax before; and, if so, where? In the books that were in every man's hand. Many had studied Turgot in the original or in translations of particular passages, and they knew his clear definition of 'Les impôts directs.' Turgot today is still the great work put in the hands of French students of the science of finance and government. Every member of that Convention was familiar with the handbook of statesmen of that age - Adam Smith's Wealth of Nations... Macaulay tells us that Pitt studied only one

> work on political economy, which guided him through his whole brilliant career in the financial administration of the British Empire, and that was Smith's Wealth of Nations. If we had only these two works, known to almost every educated man in those days, could we refuse to follow their definitions and explanations in the absence of any other evidence?" Opening argument of Appellant at 7-8, Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895).

In book V of Smith's Wealth of Nations he states six times in two sections called Article III Taxes upon the Wages of Labour and Article IV Capitation Taxes that taxes on wages are direct taxes.

> "Capitation taxes, so far as they are levied upon the lower ranks of people, are direct taxes upon the wages of labour, and are attended with all the inconveniences of such taxes." Adam Smith, Wealth of Nations, book V, 541 (Prometheus Books, Amherst, New York, 1991) (1776).

Turgot also stated that taxes on wages were direct.

The teachings of Adam Smith, whose great work immediately became well known on both sides of the Atlantic, is known to have had a decided influence on many of the founders of the American government. The distinction adopted by Adam Smith was that between taxes on receipts and on expenditures. Even Turgot, the most widely known of all the Physiocrats, classified taxes on persons as direct.

Turgot, A,R.J., Plan d'un mémoire sur les impositions, 1764:

> "Different forms of taxes. There are only three possible. The direct [tax] on lands, the direct [tax] on persons, which becomes a tax on exploitation, the indirect tax, or the tax on consumption." *The Teachings of Political Economists Defining Direct and Indirect Taxes*, by Max West, A.M. Ph.D. at 2-3, Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1894).

The criteria for determining whether a tax was a direct tax or an indirect tax was also well understood. This Appellant has read all

the related debates on the direct tax issue in the Annals of Congress for the years 1795 through 1798 and notes that members of Congress did not debate what was or was not a direct tax or an indirect tax, but only which type of tax should be levied.

> "Indirect taxes, on the contrary, Mr. H. said, where collected with facility, and were voluntarily paid. If a man found himself pinched for money, he might refrain from purchasing, at least for a time, of such articles as were taxed, and not immediately necessities of life, or he would make a less quantity serve him; but a direct tax could not be avoided, however unable a man might be to pay it. Hence, he said, would arise executions and a variety of distress amongst that class of citizens who were unable to meet the demands of Government." Annals of Cong., 4th Cong., 2nd Sess., pg. 1867 (1797).

During the debates on the 16th Amendment, the issue of direct tax vs. indirect tax was exhaustively debated consuming 34 pages of fine print in the Congressional Record. The general debate on the 16th Amendment consumed 352 pages. In 1909, as in the 1790s, the issue of what constituted a direct tax or an indirect tax was not debated, as this was well settled and Adam Smith's criteria on the matter was accepted by all. Only the appropriateness of a direct tax vs. an indirect tax was at issue.

> "Mr. Cummins. I had referred to the fact that at the time of the Constitutional Convention, ... this term had been mentioned by but two economic writers - one, Adam Smith, in Wealth of Nations, and the other a French writer by the name of Turgot. Their general idea was that a direct tax was a tax upon property or [gross] revenue and an indirect tax was a tax upon consumption or expense. But later economic writers have amplified that general idea by supplying the fundamental thought, namely, that an indirect tax was one which would be shifted from the person who was called upon to pay it to another who was to buy the thing upon which the tax was imposed." 44 Cong. Rec. 3972 (1909).

An exhaustive examination of the Congressional debates on the 16th Amendment shows that the three authorities on taxation, finance and economics quoted most were Adam Smith quoted 18 times (44 Cong. Rec. pgs. 1694, 1695, 2089, 2090, 2091, 2093, 2094, 2095, 3941, 3972, 4412, 4666, 4959 (1909).), Albert Gallatin quoted 4 times (id. pgs. 1695, 2090, 2094), and Jacques Turgot quoted 3 times (id. pgs. 1694, 1695). Each of these authorities were in agreement as to what constituted a direct tax and what constituted an indirect tax. Indirect taxes were avoidable, direct taxes were not. Indirect taxes were levied on privileges, events, or activities. Direct taxes were levied on the existence of a person or thing. It is therefore well settled that taxes which diminish the earned income from labor are "direct taxes" as one must labor in order to live, eat and exist.

The Constitution states "direct taxes ..... shall be apportioned among the several States..." art. I, sec. 2, cl. 3. All direct taxes, when levied in the several States, must be apportioned. **The Supreme Court of the United States has ruled that the 16th Amendment does not provide an exception to the apportionment rule for taxes on incomes.** The 16th Amendment therefore only provides authority for taxes on incomes when those taxes are by their nature "inherently" indirect. This issue was presented squarely to the Supreme Court in the following cases: *Brushaber v. Union Pacific R.R. Co., Tyee Realty Co. v. Anderson, Thorne v. Anderson, Dodge v. Osborn* and *Stanton v. Baltic Mining Co.* Mr. Brushaber, Tyee Realty Co. and Mr. Thorne all had the same attorney, a Mr. Julian Davies of New York City. Mr. Davies asserted in his brief in each of these cases as follows:

> "The effect of the Sixteenth Amendment was merely to waive the requirement of apportionment among the States, in its application to a general and uniform tax upon incomes from whatever source derived...
>
> The evident purpose of this amendment was not to abandon the former policy of safeguarding the several sections of the Union against disproportionate taxation, but merely to substi-

tute an apportionment according to "incomes from whaever source derived," in lieu of a *per capita* apportionment.

The utmost care was used and the clearest intention displayed to remove the necessity of a *per capita* apportionment; but there is no evidence of an intention to change the spirit or effect of the Constitution in any other respect... The income tax contemplated by the amendment is, accordingly, an income tax preserving in all respects rights secured by the Constitution, but freed from the necessity of *per capita* apportionment. Congress, when it came to legislate on the subject, found its powers in no wise broadened by this amendment save in the one respect mentioned." Brief for appellant at 9-11, Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916).

In other words, according to Brushaber, the income tax was still a direct tax. Only the criteria for apportionment changed. Apportionment was now based on incomes instead of the original *per capita* apportionment originally required by the Constitution. According to Brushaber, Congress was given "broadened" power by the 16th Amendment. In its amicus curae brief, the government argued a similar position:

"LACK OF UNIFORMITY CAN NOT BE SUCCESSFULLY URGED 1. Income taxes at least when laid on income derived from real or personal property, are direct taxes, and therefore not subject to the uniformity rule, EXPRESSLY prescribed by the Constitution...

(b) Apportionment being restricted to *direct* taxes *only* (*Flint v. Stone Tracy Co., supra* 152), the Sixteenth Amendment, in removing that restriction, recognized *any* tax upon income "from whatever source derived" as a *direct* tax, and as such subject to the apportionment rule unless specially exempted." Brief for the United States at 11-12, Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1916).

So both Brushaber and the government argued that an income tax on dividends from corporate stock was still a direct tax but now did not have to be apportioned among the several States according

to population. **The Supreme Court said they were both wrong.** The Supreme Court ruled that the tax in Brushaber was inherently an indirect tax and that the Sixteenth Amendment prevented the Court from "taking an excise [tax] out of the class [of indirect taxes] to which it belongs and transferring it to a class [of direct taxes] in which in cannot be placed consistently with the requirements of the Constitution." supra at 19. Furthermore, the Supreme Court ruled that neither Brushaber nor the government could be right without destroying the **harmony** of the Constitution. (See Supplemental Reply to Resp't's Motion for Sanctions at 4, Excerpts of R. p. 50.)

> "[t]hat the contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation..." supra at 18.

This position of the Supreme Court, that direct taxes levied without apportionment are **not** sanctioned by the Sixteenth Amendment, was affirmed by the Supreme Court in *Tyee Realty Co. v. Anderson* and *Thorne v. Anderson*. Tyee Realty Co.'s Counsel of Davies, Tolles, Glenn and Schurick, argued: "The Sixteenth Amendment authorizes a direct tax without apportionment only in so far as that tax is on income." Brief for Appellant at 12, Tyee Realty Co. v. Anderson, 240 U.S. 115 (1916). In the *Thorne v. Anderson Case*, the same law firm as in Tyee claimed: "Although one of the great limitations upon the power of Congress to levy direct taxes has been abrogated by the Sixteenth Amendment." Brief for Plaintiff at 38, Thorne v. Anderson, No. 394 (24,613) (1915). Of this contention, the Supreme Court ruled: "But we need not now enter into an original consideration of the merits of these contentions because each and all of them were considered and adversely disposed in the *Brushaber v. Union Pacific R.R. Co.*" case. Tyee Realty Co. v. Anderson, 240 U.S. 115, 117 (1916). In other words, **there is no Sixteenth Amendment exemption to the direct taxa-**

tion clauses of the original Constitution.

Double checking this conclusion we can go to the Transcript of Record for the *Stanton v. Baltic Mining Case.* Although *Brushaber* was the precedent setting case for the first income tax cases that went up to the Supreme Court after the purported ratification of the 16th Amendment, the *Stanton Case* is more interesting to our point. The *Stanton Case* was about:

> "In No. 140 (Brushaber) and No. 359 (Stanton) a stockholder seeks to restrain the corporation taxpayer from voluntarily paying its tax." Brief for the United States at 3, Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916).

According to the government, an income tax on the wages or salary of an American Citizen living and working in one of the several States of the Union is a direct tax. Only by claiming that the 16th Amendment has provided an exception to the apportionment rule of the Constitution can the IRS collect this tax on labor with a straight face. The government regularly claims they have this authority by falsely claiming these early cases settled the question in the government's favor.

A review of the Supreme Court's Transcript of Record for the *Stanton Case* shows that 12 times Stanton claimed the 16th Amendment provided this "apportionment rule exception" for direct taxes when the tax was an income tax in the nature of a direct tax. Then another 10 times Stanton alluded to this perceived exception. In addition, so did a Mr. John R. Van Derlip who filed an *amicus curiae* brief in the *Stanton Case.* The "exception to apportionment" argument was a central argument in both these briefs. The government and Mr. Van Derlip made the same claim 15 times. A sampling of Stanton's assertions is as follows:

> "The Sixteenth Amendment authorizes direct taxes upon 'incomes,' but not upon capital or property. Income taxes may now be imposed without regard to apportionment among the States, according to their population.
>
> All forms of direct taxation other than taxes on 'incomes,' clearly remain subject to the same constitutional limits as for-

merly." Brief for Appellant at 24, Stanton v. Baltic Mining Co., 240 U.S. 103 (1916).

"This is a direct tax on 'net income,' and nothing else can constitutionally be taxed directly, without apportionment." id. at 36.

"The Sixteenth Amendment only authorizes direct taxes on 'incomes.'" id. at 60.

"It must, however, constantly be borne in mind that here we are dealing with a direct tax on 'net income,' and not an excise, such as the decisions of this Court have frequently dealt with." id. at 74.

"All forms of direct taxation of real and personal property, other than income taxes, still require apportionment; otherwise they are unconstitutional." id. at 139.

In Mr. Van Derlip's *amicus curiae* brief, he made the following claims:

"The growing needs of the Government for revenue in these latter days have been deemed by the people a sufficient reason for relaxing, in a degree, the strict regulations in relation to the laying of direct taxes which prevailed prior to the promulgation of the 16th Amendment...

The effect of that amendment is to be considered in the light of these historical facts which disclose most clearly that, while the amendment lets down the bars in some degree, the extent of their lowering was carefully measured and must be fully respected...

The 16th Amendment was designed to accomplish, and in distinct terms did accomplish, the simplifying of the process of taxing incomes from whatever source derived, by relieving it from the hampering conditions theretofore attaching to a direct tax.

By the [16th] Amendment, sec.2 of Article I of the Constitution had been modified as respects the persons to be included

in any enumeration which should be the basis for the laying of a direct tax. This same section has now been modified for a second time by the 16th Amendment with the result that the first sentence of the section, in effect, now stands as if enacted in the following words: 'Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed; provided, however, that the Congress shall have power to lay and collect direct taxes upon incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.'" *Amicus Curiae* Brief by Van Derlip at 24-25. Stanton v. Baltic Mining Co., 240 U.S. 103 (1916).

"The single purpose and sole effect of the 16th Amendment is to disencumber the federal taxing power as theretofore existing in respect of incomes, so as to allow the laying of a direct tax upon incomes without apportionment, and without regard to any census or enumeration." id. at 30.

"The nature of an income tax is not changed by the amendment, but it still remains a direct tax." id. at 31.

"The situation presented by the 16th Amendment may be thus summed up:

1.) Income is the gain or profit derived from labor, or from property, or from both, and, if from property, it can only be that which is produced by its use without impairing the capital investment and which leaves such investment intact.

2.) Gains, profits and income are property which, before the adoption of the 16th Amendment, could not be taxed except in accordance with the rule of apportionment, because an income tax is a direct tax.

3.) The 16th Amendment does not change the nature of the income tax; it still remains a direct tax.

4.) By the 16th Amendment, however, a new rule introduced

into the Constitution where by a direct tax may now be assessed upon incomes without apportionment.

5.) No other change was effected by the Amendment, and, as to taxation of all classes of property other than incomes, the original constitutional limitations still obtain." id. at 71-72.

Every quote just cited from the *Stanton* Transcript of Record was **rejected** by the Supreme Court. In every way, shape and form the claim was made that the 16th Amendment provided an exception to the apportionment rule. If true, this would have been the "new rule" spoken of in the *Stanton Opinion*. The claim was made that Congress was now "disencumbered" from the apportionment rule; as such Congress would have had "new power." All this was **rejected** by the Supreme Court. In the Court's Opinion on the *Stanton Case*, the Supreme Court said:

> "But aside from the obvious error of the proposition intrinsically considered, it manifestly disregards the fact that by the previous ruling [Brushaber] it was settled that the provisions of the Sixteenth Amendment conferred no new power of taxation but simply prohibited the previously complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income derived... We are here dealing solely with the restriction imposed by the Sixteenth Amendment to the right to resort to the source whence an income is derived [now restricted] in a case where there is power to tax for the purpose of taking the income tax out of the class of indirect to which it generically belongs and putting it in the class of direct to which it would not otherwise belong in order to subject it to the regulation of apportionment." Stanton v. Baltic Mining Co., 240 U.S. 103, 112-3 (1916).

The question as to whether there is authority for the government to collect an unapportioned direct tax was settled *in the negative* by the Supreme Court. It was settled in the *Brushaber Case*. Then

the Court affirmed their *Brushaber* ruling in the *Tyee Case*, in *Dodge v. Osborn*, in *Thorne v. Anderson* and lastly in *Stanton*. An income tax on the severable net income from business or accumulated wealth is an indirect tax. An income tax on the earned income from wages and salaries of an American Citizen is a direct tax. The government is wholly without power to collect the latter without apportionment among the several States. See Objection to Resp't's Computation for Entry of Decision at pp. 3 - 7, Excerpts of R. pp. 158 -162.

Reporting on "The Revenue Bill of 1941" the House's Committee on Ways and Means prepared House Report No. 1040 dated July 24, 1941. On page 17 of this report, in the section called *Constitutionality of Proposal*, the Committee on Ways and Means stated:

> "It seems clear that Congress has the constitutional power to enact this proposed amendment. Generically an income tax is classed as an excise (emphasis mine) (*Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1). The only express constitutional limitation upon such taxes is that they be geographically uniform." H. Rep. No. 1040, at 17 (1941).

Twenty-eight years after the purported ratification of the 16th Amendment, we have the House of Representatives' Committee on Ways and Means asserting that the income tax is an *excise tax*, which is a species of an *indirect tax*.

Buttressing our conclusion that the 16th Amendment does not provide authority for an unapportioned direct tax on the labor of an American Citizen living and working in the several States of the Union, we go to Harvard Law Review's commentary on the *Brushaber Case*:

> "In *Brushaber v. Union Pac. R.R. Co.*, Mr. Chief Justice White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that an income tax is 'indirect,' rather than as making an exception to the rule that direct taxes must be apportioned." The Income Tax and the Sixteenth Amendment, 29 Harvard Law Review 536 (1915-

1916).

Again, the *Cornell Law Quarterly* simplifies what the Court said in *Brushber*:

"The contention of the appellant was as follows:

(1) The sixteenth Amendment provided for a new kind of a direct tax, a tax on incomes 'from whatever source derived.'

The court through Chief Justice White held that the tax [in Brushaber] was constitutional. The major proposition of the appellant's argument is not true. Hence, the conclusion does not follow. The sixteenth amendment does not permit a direct tax, (in fact as it will be later be shown, the court does not think that the amendment treated the tax as a direct tax at all), carrying with it the distinguishing characteristic of a hitherto unrecognized uniformity.

The amendment, the court said, judged by the purpose for which it was passed, does not treat income taxes as direct taxes but simply removed the ground which led to their being considered as such in the Pollock case, namely, the source of the income. Therefore, they are again to be classified in the class of indirect taxes to which they by nature belong." Ramon Siaca, The Federal Income Tax Law of 1913: Construction of the Sixteenth Amendment, 1 Cornell Law Quarterly 298, 299 and 301 (1916).

Said another way, the theory upon which the *Pollock Case* was decided was overturned by the Sixteenth Amendment. Also, commenting on *Brushaber, California Law Review* said:

"The constitutionality of this act and the construction of the 16th Amendment have been passed by the Supreme Court in the case of *Brushaber v. Union Pacific Railroad Co...*

The construction which Mr. Chief Justice White....lays upon the 16th Amendment, as declaring that income taxes are to be regarded as indirect rather than as excepting them from the rule of uniformity..the one [construction] adopted by the court has the merit of harmonizing all of the provisions of the Constitution,

and of subjecting income taxes to the requirement of uniformity." Constitutional Law: Income Tax: Sixteenth Amendment, 4 California Law Review 333, 335-6 (1915-6).

From the field of economics we have the following from *The Journal of Political Economy*:

"Finally it holds the purpose of the amendment was not to change the existing interpretation of the term 'direct tax,' except to the extent necessary to accomplish the result intended - that is, the prevention of any resort to the sources from which a taxed income is derived in order to cause such a direct tax on the income to be held to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties, and imposts and place it in the class of direct taxes." Washington Notes, The Income Tax Decision, 24 The Journal of Political Economy 299, 300 (1916).

There are more than one species of income taxes. According to Professor Edwin Seligman, Ph. D., who was head of the Economics Department of Columbia University and part of the investment banking family of J. & W. Seligman (Professor Seligman was a prolific writer on the income tax issue having written an exhaustively researched 700 page book entitled *The Income Tax* (The MacMillian Co., 1911) and was also an expert witness for both sides on the *Pollock Case* and had testified before Congress on the issue of taxation):

"The Supreme Court of the United States has thus held that certain kinds of income taxes are indirect, and that still other kinds of income taxes are direct, and that still other kinds of income taxes are invalid, irrespective of whether they are direct or indirect." E.R.A. Seligmen, The Income Tax Amendment, 25 Political Science Quarterly 193, 197 (1910).

Thus, only income taxes that are indirect, where only the income is diminished by the tax and the underlying source remains whole, may be levied under the authority of the Sixteenth Amendment. This is income **derived** from a source; the source remains whole.

Whereas, income taxes which are direct, where the source is diminished by the tax, must today be apportioned among the several States according to population when no privilege attaches.

In the early income tax cases of *Brushaber, Stanton, Tyee, Dodge* and *Thorne* the Supreme Court ruled correctly. To Appellant's knowledge, these cases have not been overturned. The Supreme Court had to rule as they did because the legislative record, the historical record and the will of the American People were necessarily relied on as the foundation for the Supreme Court's decision.

The Constitution mandates that the Congress keep a journal which shall be made available to the public. "Each house shall keep a journal of its proceedings, and from time to time publish the same." U.S. Const. art. I, sec. 5, cl. 3. This was a requirement of the framers because they acknowledged that the American system of government was based on a delegation of power, the ultimate sovereignty being the American People. It was therefore necessary that the American People have a record of Congress's proceedings available to them.

The Sixteenth Amendment, written by Senator Brown of Nebraska, originated in the Senate Finance Committee and was exhaustively debated by the Senate. The House only debated it for three to four hours. The 16th Amendment was called Senate Joint Resolution #40 as it moved through Congress for Congress's approval. It had a predecessor known as Senate Joint Resolution #39 which read:

> "The Congress shall have power to lay and collect *direct* (emphasis mine) taxes on incomes without apportionment among the several States according to population." 44 Cong. Rec. 3377 (1909).

The immediate response to S.J.R. #39 was criticism from Senator Mr. Laurin who stated:

> "I think if the Senator from Nebraska will change his amendment to the Constitution so as to strike out the words 'and direct taxes' in clause 3, section 2, of the Constitution, and also to

> strike out the words 'or other direct' in clause 4 of section 9 of the Constitution, he will accomplish all that his amendment proposes to accomplish and not make a constitutional amendment for the enacting of a single act of legislation." (id. at 3377).

It is clear that if Congress intended to provide constitutional authority for the levying of an indirect tax on income and a direct tax on the source of income, such authority would have been enumerated within the income tax amendment. When S.J.R. #39 was replaced by S.J.R. #40, which ultimately became the 16th Amendment, the term "direct taxes" was replaced with only "taxes." There is more. S.J.R. #39 had its own predecessor known at S.J.R. #25 which proposed to amend the Constitution and read as follows: "The Congress shall have power to lay and collect taxes on incomes and inheritances." (id. at 1568) This proposed amendment was also introduced by Senator Brown from Nebraska who made a speech at the time of its introduction. As in S.J.R. #39, the very next statement made after the introduction of S.J.R. #25 was from Senator Rayner of Maryland who raised the issue of harmony with the direct taxation clauses of the Constitution. Senator Rayner stated:

> "In looking at the joint resolution I see that it reads 'The Congress shall have power to lay and collect taxes on incomes.' It has that power now. Congress has the power now to lay and collect taxes on incomes and on inheritances.
>
> I will call the Senator's attention to the fact that unless you change the clause of the Constitution which provides for apportionment [of direct taxes] the joint resolution would not repeal that clause. The two clauses would stand *in pari materia* together and you would still have an apportionment." 44 Cong. Rec. 1568-9 (1909).

It is clear with S.J.R. #39 and S.J.R. #25 that any income tax amendment that was going to provide for a direct tax on the source of income, in the constitutional meaning of the term "direct tax," would have to conform to constitutional clauses requiring apportionment of direct taxes. Either that or the direct taxation clauses would need to be struck from the original document. The principle

of " harmony," spoken of in the *Brushaber Opinion,* was at work here.

It is also clear in both cases, when the very next statement in the debate of both resolutions concerns the harmony of the proposed amendment with the direct taxation clauses of the Constitution, that Congress was well aware whether or not they were contemplating the income tax amendment to provide for a direct tax or an indirect tax. Not once, but twice, other members of Congress had rejected, on this very point, a proposed constitutional amendment that sought to provide authority for the collection of a direct tax without apportionment without having modified these direct taxation clauses. We can therefore conclude, as the Supreme Court did in *Brushaber*, that the 16th Amendment only dealt with indirect taxes, i.e., taxes on incomes and not taxes on sources of incomes when there is no privilege present.

Continuing on, Senator Brown from Nebraska wrote all three versions of the income tax amendment, S.J.R. #25, S.J.R. #39, and S.J.R. #40. You would think that after getting shot down twice on the same point, by the third attempt, i.e., S.J.R. #40, he would have gotten it right.

The evidence that direct taxes are without the authority of the Sixteenth Amendment is overwhelmingly compelling. The Senate voted on the 16th Amendment (S.J.R. #40) at 1 o'clock on July 5, 1909. Senator Aldrich had earlier tried to ram it through the Senate on Saturday, July 3rd, a holiday weekend, for an immediate vote without debate when only 52 senators were present. A few senators protested and the vote was set for the following Monday. During the debate on July 3rd, several amendments were proposed to S.J.R. #40 that came up for a vote at the appointed hour of 1 PM Monday, July 5th, 1909.

The first of these was an amendment to S.J.R. #40 by Senator Bailey of Texas to provide that conventions of each of the several States be required to ratify the constitutional amendment as opposed to the state legislatures.

This was voted down. Next was another amendment by Bailey to add the language "and may grade the same" to modify the term

"income tax" as a way to provide that the tax may be graduated. Bailey proposed this language on Saturday, July 3rd. By Monday, July 5th, when this came up for a vote, Bailey realized it would fail and tried to have it withdrawn. Bailey wanted it withdrawn because, according to Bailey:

> "Mr. President, I am satisfied that this amendment will be voted down; and voting it down would warrant the Supreme Court in hereafter saying that a proposition to authorize Congress to levy a graduated income tax was rejected." 44 Cong. Rec. 4120 (1909).

In other words, Senator Bailey understood that once Congress rejected a particular provision while amending the Constitution, Congress would be forever bared from implementing that provision by way of statute in the future.

Bailey was told by the Senate's Vice President that he could not withdraw the amendment and that it must be voted on. The rules required it. Senator Aldrich intervened and somehow the rules were suspended and the amendment was withdrawn without a vote.

Also there was an amendment by Senator McLaurin of Mississippi. After a long discussion by him about direct taxes, Senator McLaurin proposed this amendment to S.J.R. #40 was as follows:

> The SECRETARY. "Amend the joint resolution by striking out all after line 7 and inserting the following: 'The words 'and direct taxes' in clause 3, section 2, Article I, and the words 'or other direct,' in clause 4, section 9, Article I. of the Constitution of the United States are hereby stricken out." 44 Cong. Rec. 4109 (1909).

The Senate rejected this, as this amendment failed by voice vote. Had it passed, it would have provided authority for a species of income tax that was inherently a direct tax to be levied without apportionment.

Lastly there was an amendment by Senator Bristow of Kansas to replace S.J.R. #40 with S.J.R. #39. S.J.R. #39 read: "The Congress shall have the power to lay and collect *direct* [emphasis mine]

taxes on incomes without apportionment among the several States according to population." This substitute amendment also included a provision to elect senators by popular vote. After some debate this was also rejected by voice vote. id. at 4120. The election of Senators by popular vote was soon thereafter approved by the 17th Amendment. Therefore this instant amendment failed because of the direct tax provision.

Next, S.J.R. #40 was voted on and passed 77 to 15. What can we conclude from all of this? First of all we can conclude that the Senate understood it was the practice of the Supreme Court to look at the proceedings of Congress to see what the intent of Congress was. If Congress voted on a measure and rejected it, then the Supreme Court would interpret that vote as a clarification of the intent and purposes of Congress.

> "One of the most readily available extrinsic aids to the interpretation of statutes is the action of the legislature on amendments which are proposed to be made during the course of consideration in the legislature. Both the state and federal courts will refer to proposed changes in a bill in order to interpret the statute as finally enacted. The journals of the legislature are the usual source for this information. Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment." Sutherland on Statutory Construction, sec. 48.18 (5th Edition).

We also learned that twice the Senate was offered the opportunity to vote on a measure to provide that the income tax being considered by the 16th Amendment would provide for a direct tax within the constitutional meaning of the term "direct tax." Twice in the hour or so prior to the final Senate vote on the income tax amendment, the Senate rejected the opportunity to bring direct taxes within the scope of the 16th Amendment. This issue was squarely before Congress, and Congress rejected it.

> "It is plain, then, that Congress had this question presented to its attention in a most precise form. It had the issue clearly

drawn. The first alternative was rejected. All difficulties of construction vanish if we are willing to give to the words, deliberately adopted, their natural meaning." U.S. v. Pfitsch, 256 U.S. 547, 552 (1921).

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-3 (1984).

Alabama was the first state to ratify the Sixteenth Amendment. On August 3, 1909 the New York Times reported on its passage in the Alabama House of Representatives. Quoted in the New York Times article was debate on whether or not the Sixteenth Amendment would "affect salaries." "Col. Sam Will John... represented that it would not." See Appellant's Tax Court Brief at pages 9 and 10. The New York Times is a newspaper of record read throughout the country and would have alerted people throughout the country as to this fact as they considered passage of the Sixteenth Amendment. As the first state to ratify the 16th Amendment, Alabama set a precedent.

It is abundantly clear that the purpose of the Sixteenth Amendment was to shift a portion of the tax burden from those Citizens who spent virtually all the money they worked for on consumption to those who had income from accumulated wealth. For an exhaustive collection of relevant quotes from the congressional debates on the 16th Amendment as to its purpose, see the Courtesy Copy of Cited Authorities provide for the Court's convenience.

The income tax amendment was a Democrat Party idea. The purpose of the Sixteenth Amendment can be best be summed up with the plank from the 1908 Democrat Party Presidential Platform which states:

> "We favor an income tax as part of our revenue system, and we urge the submission of a constitutional amendment specifically authorizing Congress to levy and collect a tax upon individual and corporate incomes, to the end that wealth may bear its proportionate share of the burdens of the Federal Government." 44 Cong. Rec. 3309 (1909).

This platform plank was repeatedly quoted during the Congressional debates on the Sixteenth Amendment. The intent of the Sixteenth Amendment was to bring tax relief to those who were wage-earners and who paid out a high percentage of their yearly earnings to taxes on consumption. Senator Brown, author of the 16th Amendment wrote an article entitled Shall the Income Tax Amendment be Ratified, which appeared in *The Editorial Review* and can be found at Senate Document No. 705, 61st Congress, 3d Session (1910). Senator Brown tells us on page 7 of this article what he intends to be taxed by the 16th Amendment and no mention is made of placing a direct tax on the labor of the American People.

> "The growing objection to the tax on consumption is vitalized by the fact that such a tax discriminates against those least able to pay the tax and in favor of those whose ability to pay the tax is unquestioned and whose protection from the Government is so much greater because their larger property requires and receives a larger measure of protection. When the Government seeks to lay a tax for its defense or its support on the incomes of the county, it should reach all incomes. If the income arises from an investment in lands, it should be taxed; if it arises from investments in manufacturing enterprises, in railroads, in banks, in newspapers, in the mercantile business, or in steamship lines, it should be taxed."

The American Constitutional system of government is unique in world history as it recognizes that the ultimate political power resides with the People. The American system of constitutional law does not allow for "bait and switch" trickery on the part of the government. Government's authority is limited by the will of the American People. The Constitution is the framework which de-

fines how that power will be exercised. The spirit of the Constitution lies in the Declaration of Independence, its ultimate purpose to "create a more perfect Union" and to guard against the abuses of King George III as proclaimed in the grievances listed in the Declaration of Independence. One of those grievances was "For imposing taxes on us without our consent."

> "The American Republic was birthed because the Mother Country violated this covenant principle of limited authority. England, after successfully defending the American colonies in the French and Indian Wars, claimed the right to levy a tax on the Americans in order to pay the costs of that war which had directly benefitted them.
>
> The Americans responded, asking by what authority they were being taxed. They were not represented in the English Parliament. By their government charters, they had the rights of Englishmen and one of those rights was not to be taxed except by vote of the representatives that they had elected.
>
> Thus, the cry of the American revolution - 'No taxation without representation' - was rooted in the Biblical covenant principle requiring the English King and Parliament to justify their authority to tax them. That principle had been adopted in England over 500 years earlier in the 1215 Magna Carta, a covenant limiting the power of the king to tax only in accordance with the vote of the people's elected representatives." Herbert W. Titus, The Constitution of the United States 38-39 (Titus Publications, Chesapeake, Virginia 1997).

The point of this discussion is that the American People never consented to an unapportioned direct tax which would diminish the earnings from their labor. The government is therefore wholly without authority to collect a direct tax on the Appellant's labor. The idea that the American People during the period from 1909 to 1913, when the 16th Amendment was debated and purportedly ratified, chose to reduce indirect taxes on their consumption in exchange for direct taxes on their labor is unsupported by any evidence whatsoever.

The government's claim that the Supreme Court authorized this tax with their dicta in the *Eisner Case, Stratton Case* and *Doyle Case* is wholly without foundation. This Appellant has read the Supreme Court's transcript of record for these cases and discovered that these cases had nothing to do with the issue of an unapportioned direct tax on the labor of the American People. Such a question was never put before the court in any of these cases. It was never argued. There was no evidence submitted either for or against such an argument. It was a non-issue.

In defense of this unapportioned direct tax the government claims that the Supreme Court determined, "Income may be defined as the gain derived from capital, from labor, or from both combined." Eisner v. Macomber, 252 U.S. 189, 207 (1919).

The origin of this quote was from the *Stratton's Independence v. Howbert Case* at page 415. This quote also appears in the *Doyle v. Mitchell Brothers Co. Case* at page 185. As long as corporations utilize human labor, these business will, if well managed, derive income from labor. A tax on this income will diminish only the net income, it will leave the laborer alone. The laborer will remain whole. Such an income tax as authorized by the 16th Amendment is an indirect tax regardless of whether or not the business, whose income is taxed, is an incorporated or an unincorporated business.

Each of these three cases, *Stratton's Independence v. Howbert, Doyle v. Mitchell Brothers Co.* and *Eisner v. Macomber* involved corporations either suing or being sued by the Collector of Internal Revenue. *Stratton* and *Doyle* were about corporate profits. *Eisner* was about stock dividends. None of them had anything to do with the "are wages income?" question. This question was never before the Court and is a wholly different issue than that of income taxes on corporate profits. For a discussion on the constitutional definition of "income" see Appellant Hart's Tax Court Br. pp. 7 - 9, Excerpts of R. pp. 43 -44. See Supplemental Reply to Resp't Mot. for Sanctions, pp. 4 -5, Excerpts of R. pp. 50 - 51.

In order for the government to buttress its claim that "wages are income" the government will also quote the Supreme Court in the

Stratton Case where the court said,

> "As to the alleged inequality of operation between mining corporations and others, it is of course true that the revenue derived from the working of mines results to some extent in the exhaustion of the capital. But the same is true of the earnings of the human brain and hand when unaided by capital, yet such earnings are commonly dealt with in legislation as income." *supra* at 415.

We have to remember that Stratton was a mining corporation. In Stratton's briefs they argued that all a mining company ever did was to convert capital in the form of raw ore into capital in the form of money. If you accepted Stratton's logic, no mining company ever in the history of the world nor in the future until the end of eternity would have ever generated a profit. Appropriately the Supreme Court rejected their argument. Furthermore, there were several entries in the Congressional Record which addressed the issue of, "earnings of the human brain and hand unaided by capital."

> "Mr. BAILEY. There is one addition to the property tax [income tax] that I would like to make. I would compel a man whose earning power from brain exercised in one of the professions or from inventive genius is great to pay on his income beyond a certain point [sic]. When a lawyer like the Senator from New York can earn at the bar, of which I am glad to say he is the honored head, $150,000 every year, I think he ought to be made to pay the Government a tax on that earning power, because in taking from him the small tribute which the law exacts we subtract no comfort from his home. I believe that any man in law or medicine or any other employment in life who exhibits an earning capacity far beyond the necessities of his home ought to be compelled to pay the Government which protects him in the exercise of his talents and in the accumulation of this wealth... But save and except only this earning capacity of talent or of genius, I would lay every dollar's worth of the Government tax upon the property of men and not upon the wants

of men. (sic) 44 Cong. Rec., 1702 (1909).

At the time, 1909, the average American family earned $436 per year. So in Senator Bailey's example, he was using a man whose earnings was more than 340 times that of the average American family. Senator Bailey, a democrat from Texas, was a passionate and outspoken supporter of the Sixteenth Amendment. At one point in the income tax debate Senator Bailey was misquoted by a newspaper reporter. When the Senator saw this reporter in the halls of Congress he punched him out! (See, Senator Bailey Assaults Reporter, New York Times, May 28, 1909, page 1.)

So that we might be absolutely clear what construction we should place on the *Stratton* quote about "earnings from the human brain unaided by capital" and the Bailey quote about lawyers making $150,000 per year, lets back up a few paragraphs in the Congressional Record and listen to Senator Bailey again.

> "I have no hesitation in declaring that a tax on any useful occupation can not be defended in any forum of conscience or of common sense. To tax a man for trying to make a living for his family is such a patent and gross injustice that it should deter any legislature from perpetrating it." 44 Cong. Rec., 1702 (1909).

So if the *Stratton, Doyle* and *Eisner v. Macomber Cases,* all dealing with corporations, had nothing to do with the "wages are income" question, where else can we look to determine what construction should be placed on the Supreme Court's quote. Maybe it is *Lucas v. Earl*, 281 U.S. 111 (1930). But this case was about bifurcating income based on a contract written in 1901. The question of whether nor not unapportioned direct taxes may be placed directly on labor under the authority of the 16th Amendment had nothing to do with the case. The conclusion therefore follows that there is no evidence to support the claim that the American People consented to an unapportioned direct tax on the labor of a Citizen working in the private sector in one of the several States of the Union. If the American People did not consent to an unapportioned direct tax, then the government is without authority to levy one.

Hart has exhaustively researched the Congressional Record for the debates on the 16th Amendment and other related congressional documents, has read over 300 newspaper articles, has nearly been exhaustive in researching law journals and political economy journals. In this research no evidence was found that supports the claim that when the Supreme Court wrote that corporations "derived income from labor" that that meant a wage-earner's wage was income within the meaning of the 16th Amendment. On the contrary, all the evidence shows that those involved in the 16th Amendment debate understood that the income to be taxed under the 16th Amendment was net income from unincorporated businesses and passive income from accumulated wealth. Wages and salaries are without the constitutional definition of "income."

Hart will admit that the government may directly tax labor without apportionment in geographical areas where the United States has exclusive jurisdiction in accordance with the following Ninth Circuit's ruling. In such geographical areas and districts "wages are income."

> "The power of Congress, in the imposition of taxes and providing for the collection thereof in the possessions of the United States, is not restricted by constitutional provision (section 8, article 1), which may limit its general power of taxation as to uniformity and apportionment when legislation for the mainland or United Sates proper, for it acts in the premises under the authority of clause 2, section 3, article 4, of the Constitution, which clothes Congress with power to make all needful rules and regulations respecting the territory or other property belonging to the United States." Lawrence v. Wardell, 273 F. 405, 408 (9th Cir. 1921).

Therefore, since this Appellant does not live is such a geographical area or district subject to this exclusive jurisdiction, nor is the Appellant an employee of the government, the government is without authority to place an unapportioned direct tax on Appellant. For Appellant's status as Citizen, see Hart's Tax Court Brief pages 1 - 3, Excerpts of R. pp. 37 -39.

Issue #2: (Omitted in this appendix)

Conclusion and Relief Sought

The evidence from case files of the Supreme Court of the United States and the evidence from the Congress upon which Hart relies in **Issue #1** proves undeniably that there is no apportionment rule exemption for income taxes. Therefore, the authority for levying income taxes provided by the Sixteenth Amendment encompasses only that of income taxes which are "inherently" indirect. The tax which the Commissioner is attempting to collect from Hart is direct tax.

While there are geographical areas and districts and certain classes of persons where the Commissioner may collect an what is in substance an unapportioned direct tax, the Commissioner failed to prove that Hart is among such classes of persons or within such geographical areas or districts.

Therefore, as the Decision of the Tax Court is not in accordance with law, Hart requests that this Court reverse the Tax Court's Decision and remand the case back to the Commissioner and order the Commissioner to refund all monies paid by Hart for 1994 with interest and whatever other relief this Court deems appropriate. See 26 U.S.C. 7482 (c). Hart also requests that all penalties and sanctions be abated. In the alternative, Hart requests that this Court to remand the case to the Tax Court ordering the Tax Court to accept into evidence documents related to the system of records kept by the Commissioner mandated by Title 5 section 552 (a) and other public documents.

Respectfully Submitted:

_____

Philip Lewis Hart, pro per

Statement of Related Cases

Pursuant to this Court's Circuit Rule 28-2.5, this Appellant

states that there are no related cases pending before this Court in which this Appellant is involved.

Appendix E

Appellant's Reply Brief on Appeal to the Ninth Circuit

In the United States Court of Appeals
for the Ninth Circuit

No. 01 - 70173 Lower Court No. 10398-98

Philip Lewis Hart
Petitioner - Appellant,
v.

Commissioner of Internal Revenue
Respondent - Appellee.

On Appeal from the Decision of the United States Tax Court

Reply Brief for the Appellant

After a review of the decisions from the various Circuit Court of Appeals regarding the authority granted to Congress by the American People to tax incomes, it is well settled among those knowledgeable on the 16th Amendment issue that there is total confusion as to what the 16th Amendment did or did not do. To some degree every Circuit has it wrong. Much of the fault of this state of affairs lies with the inadequate research that litigants have presented to the courts. Certainly this creates a **due process** problem. Fortunately, the Supreme Court of the United States has consistently ruled cor-

rectly for every one of the early income tax cases.

Non-apportioned Direct Tax. In the instant case, the Appellee cites Eisner v. Macomber, 252 U.S. 189 (1919) in an attempt to buttress Appellee's argument that the 16th Amendment provides authority for a non-apportioned direct tax on the American people. *Eisner v. Macomber* was a case about taxing the stock dividends of a corporation as income under the 16th Amendment. Eisner was a collector of internal revenue and Macomber was the recipient of the stock dividend. The Supreme Court ruled against the government and in favor of Macomber. Macomber asserted in her complaint,

> "That the Act of Congress under which said sum... was levied on said additional shares constituting said stock dividend... is invalid and void, in so far as the same may be asserted to confer power to make such levy on said additional shares constituting said stock dividend... because in violation of the provisions of article 1, section 2, clause 3, of the Constitution of the United States, to the effect that 'direct taxes shall be apportioned among the several States,'... and said additional shares... did not in whole or in any part of proportion thereof... constitute income and were not subject to taxation as income within the meaning of the provisions of the sixteenth Amendment."

The same or similar language occurred in Macomber's first brief to the Supreme Court at pages 4, 6, 13, 24, 34 and on rehearing in Macomber's second brief to the Supreme Court at pages 7, 19, 29-32, 36, 45 and 57. The main contention of Mrs. Macomber was that an income tax on her stock dividend would be a direct tax unauthorized by the Sixteenth Amendment as there was no authority granted by the Constitution to Congress to levy an unapportioned direct income tax. The Supreme Court correctly ruled against the government and for Mrs. Macomber. In other words, the Supreme Court would not let the government cross the line between indirect taxes and direct taxes such that a direct income tax could be levied without apportionment.

In the *Eisner Opinion* the Court said "A proper regard for its

genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes..." The Court also went on to say that the word "income" had the meaning "as used in common speech" and further that "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate."

The Supreme Court obviously understood that the **genesis** of the 16th Amendment was:

> "the purpose of the Amendment was thus 'not to change the existing interpretation except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties and imposts and place it in the class of direct tax.' Brushaber v. Union Pacific R.R. Co." Brief for Macomber at 24.

After the *Pollock Decision* and before the purported ratification of the Sixteenth Amendment any income tax on the severed net income from real estate and from personal property was considered a tax on the source itself and therefore needed to be apportioned as a direct tax because of the theory upon which the *Pollock Case* was decided. The theory being that a tax on the net income from real estate and from personal property was the same as a tax on the underlying source from which the income was derived.

> "The ratification of this amendment [sixteenth] was the direct consequence of the decision of 1895 [Pollock] whereby the attempt of Congress... to tax incomes uniformly throughout the United States was held... to be unconstitutional. A tax on incomes derived from property, the Court declared, was a 'direct tax'..." Legislative Reference Service, Library of Congress, The Constitution of the United States of America, 1191

(U. S. Gov't Printing Office, 1953).

The practical effect of this was to make it impossible to levy an income tax on the accumulated wealth of the nation. Without the ability to tax the accumulated wealth of the nation in some way shape or form, almost the entire tax burden of the support of the federal government fell on taxes on consumption. The wage-earning class, who consumed almost all their earnings just trying to exist, were carrying nearly the entire tax burden for the support of the federal government. Accumulated wealth had a free ride. This was the **genesis** of the 16th Amendment spoken of in the *Eisner Decision*. **Consequently, the purpose of both the 16th and 17th Amendments was to bring tax relief to wage-earners.**

> "Mr. BYRD. Its very name [protective tariff] means inequality of tax burden. It means a tax upon consumption and not upon wealth, upon what one eats and wears and not upon his property; it means that the citizen who can scarcely provide food and raiment for his wife and children contributes as much or more to the support of the Government as does the multimillionaire, and it means that the consumer is not only taxed for the support of his country, but is compelled to contribute five times more to swell the fortunes of millionaire manufacturers and trust manipulators." 44 Cong. Rec. 4415-6 (1909).

There have been over 2,000 attempts to amend the Constitution, of which 27 have been successful. Of the first 15 amendments, 13 of them came as a result of great social upheaval, and one of the remaining two was meant solely to overturn a Supreme Court decision. The 16th and 17th Amendments were likewise the result of a great social movement and this Court would be in error to disregard the **genesis** of this process. At the time of the writing of the 16th and 17th Amendments the country was well into the industrial revolution. One of the outcomes of this revolution was the monopolization of American industry and the aggregation of large sums of capital and wealth. The monopolization of American industry was facilitated by the imposition of high tariffs which effectively taxed the consumption of the American people. The United

States Senate played a pivotal roll in securing these high tariffs for the benefit of those who had accumulated great wealth. At the time the members of the Senate were appointed by the state legislatures and the perception among the American people was that wealthy businessman bought their way into the Senate through financial influence. Then once in the Senate, these men would protect their business enterprises by promoting high tariffs. The American people sought thru ratification of the 17th Amendment to prevent the Senate from being controlled by the wealthy monopolists.

> "Mr. ADAIR. The action of the Senate in dealing with the tariff emphasizes the fact that we have too many millionaires in that body and that a few high-priced funerals would be a good thing for the country. As I am informed, there are now in the United States Senate 38 millionaires representing over $140,000,000. What can the people expect at their hands but legislation designed to aid the special-privileged class. I surely hope, Mr Speaker, that the day will soon come when Senators will be elected by a popular vote of the people, and that the United States Senate will no longer be the dumping ground for millionaires, who have nothing in common with the plain people.
>
> I hope the day will soon come when the United States Senate will be composed entirely of men who will represent more loyalty and less wealth, more patriotism and less plutocracy; men who love their country more than their money. When that body is so made up, such tariff bills as the one we are now considering will never emanate from that end of the Capitol." 44 Cong. Rec. 4435 (1909).

The wage earners and framers among the American people were of the opinion that inorder to reduce the tax burden on their consumption they were going to have to shift some on the tax burden onto the incomes from accumulated wealth. They attempted a two pronged strategy to accomplish this. The first prong was to amend the Constitution so that incomes from accumulated wealth could be taxed under the rule of uniformity instead of the rule of apportionment, the latter being required by the *Pollock Court*. The second

prong was to amend the Constitution a second time so that the members of the Senate would be elected by popular vote. **The ultimate goal of this effort was to bring tax relief to wage-earners.**

Nowhere in any historical records is there any evidence that the American People sought to authorize Congress to impose a direct tax exempted from the rule of apportionment on the people themselves in the form of a tax on their wages or salaries. Congress ultimately derives its power from the American People, the People being the Principal and Congress being the agent. Congress only has that power that was delegated to it and no more.

An exhaustive review of the congressional debates on the Sixteenth Amendment reveals that Senator Brown of Nebraska, author of the Sixteenth Amendment, never once mention that the goal of the Sixteenth Amendment was to tax the wages and salaries of the American people. In Senator Brown's seven page essay entitled Shall the Income Tax Amendment be Ratified?, found at Senate Document No. 705, 61st Congress, 3d Session (1910) Senator Brown never mentions that he intends to tax wages and salaries by the Sixteenth Amendment. see Supplemental Addendum at 42.

In support of the Sixteenth Amendment, Senator Brown presented to the Senate a letter by the Governor of New Jersey to the New Jersey Legislature wherein Governor Fort argued that:

> "A tax laid upon any such basis as that [the *Pollock* rule] would be of little if any value, and would fail to reach persons with large incomes who should be the ones to bear the burden of such taxation.
>
> "An income tax is the most just and equitable tax that can be levied. It imposes the exactions of government upon the citizen in proportion to his ability to bear it and upon the basis of wealth.
>
> "An income tax is a tax that is sure to reach all classes of property, real and personal." Senate Doc. No. 365 at 3-4, 61st Congress, 2d Sess. (1910).

Clearly Governor Fort understood that it was net income/severable income from property that was to be taxed by the 16th Amend-

ment. Only the income would be diminished by such a tax. The underlying source would remain whole. No mention was made of taxing wages and salaries in this address by Governor Fort to the New Jersey Legislature. Governor Fort also made the point that much of the wealth of the nation had accumulated into few hands. The American people understood that the accumulated wealth of the country was receiving the benefits of governmental protection, yet did not pay taxes for this protection. Governor Fort said:

> "It has been stated... that over 80 percent of all the vested wealth of this country is owned and controlled by 3,000 estates, corporations and individuals. It is obvious that 80 percent of the annual taxes levied is not borne by the group just mentioned." *supra* at 4.
>
> Mr. SULZER. Mr. Chairman, all legislation [the protective tariff] bestowing special benefits on the few is unjust and against the masses and for the classes. It has gone on until less than 8 per cent of the people won more than two-thirds of the wealth of our country." 44 Cong. Rec. 3761 (1909).

In a letter to Congress on June 16, 1909, President Taft encouraged Congress to propose an income tax amendment to the Constitution for the purpose of overturning the *Pollock Decision*.

> "That decision of the Supreme Court [Pollock] in the income-tax cases deprived the National Government of a power... It is undoubtedly a power the National Government ought to have... I therefore recommend to the Congress that both Houses, by a two-thirds vote, shall propose an amendment to the Constitution conferring the power to levy an income tax upon the National Government without apportionment among the States in proportion to population." Senate Doc. No. 98 at 2, 61st Congress, 1st sess. (1909).

President Taft also made the point that the large majority of Americans supported this constitutional amendment. Why? So people could live in fear as they do under the present system?

> "I have become convinced that a great majority of the people

of this country are in favor of vesting the National Government with power to levy an income tax, and that they will secure the adoption of the amendment in the States, if proposed to them." President Taft, supra at 2.

President Taft was an eminent lawyer of his time; he later went on to be Chief Justice of the Supreme Court. He well understood the income tax issue and also said, "The tax on net income is preferable to one proportionate to a percentage of the gross receipts, because it is a tax upon success and not failure. It imposes a burden at the source on the income at the time when the... collection is easy." supra at 3. Was he talking about a tax on a man's wage or salary? No he wasn't.

> "It will doubtless be argued that the adoption of this amendment will open a way to the curbing of swollen and ill-gotten fortunes, or at least will compel the owners to pay a larger share of the expenses of government than they now do, and that the poor will be relieved of the taxes in the same proportion." Raleigh C. Minor, The Proposed Income Tax Amendment to the Federal Constitution, 15 Virginia Law Register 737, 751 (1910).

The vast majority of Americans were in favor of such an amendment because they understood that the word "income" as used in common speech did not include wages and salaries. It was net income from business whether incorporated or not, and passive income from investments.

> "Mr. KEIFER. Now Mr. Speaker, there is something said about the necessity of an income tax to reach the idle rich; but if we had only the idle rich, I think I would rather like the programme; but there are in this country thousands and tens of thousands of enterprising spirits who have gone forth with energy, industry, and by displaying economy have acquired fortunes, and they are the persons who are to be reached by an income tax." 44 Cong. Rec. 4399 (1909).

> "Both parties are in favor of it, every voter who has no income is in favor of taxing everybody - man, woman, or child - who

has an income. And every legislator who is afraid of his constituents is in favor of the most popular proposal in sight." The Income Tax Amendment, Editorial, N.Y. Times, pg. 8, April 29, 1910.

If the American people were attempting to require a bus boy at Burger King to file a 1040 and pay the income tax why did Representative Keifer talk about only tens of thousands of people being potentially liable for the income tax? The population of the country was ninety million at the time. And why did the editorial staff of the New York Times say "Every voter who has no income is in favor of taxing everybody... who has an income"? The answer is obvious, it was accumulated wealth and business profit that was going to pay the income tax, not wage-earners. In the minds of the American People who lobbied for ratification of the Sixteenth Amendment wages were not income.

"A tax on income may be oppressive and unwise, but it is not destructive. The capital producing the income remains... The humble workers are not helped by the taxes which the rich evade. The evasions of the rich are in fact the burdens of the poor." Bad Tax Laws, Editorial, N.Y. Times, pg. 10, March 24, 1911.

"The poor man does not regard his wages or salary as 'an income'" Governor A.E. Wilson (Kentucky) on the Income Tax Amendment, N.Y. Times, part 5, pg. 13, February 26, 1911.

"Mr. HEFLIN. An income tax seeks to reach the unearned wealth of the country and to make it pay its share." 44 Cong. Rec. 4420 (1909).

"Mr. HEFLIN. But sir, when you tax a man on his income, it is because his property is productive. He pays out of his abundance because he has got the abundance. If to pay his income tax is a misfortune, it is because he has the misfortune to have the income upon which it is paid." 44 Cong. Rec. 4420 (1909).

We can go on infinitum with quotes which support this Appellant

Hart's assertion that the word "income" as used in the Sixteenth Amendment means only net income derived from business and passive income derived from accumulated wealth. In several thousand hours of research, Hart found no evidence which contradicts his assertion that the American people never intended to grant to Congress the power to levy an unapportioned direct tax on wages and salaries. **There is no 16th Amendment authority for a non-apportioned direct tax.**

> "These extrinsic aids may show the circumstances under which the statute was passed, the mischief at which it was aimed and the object it was supposed to achieve. Although a court may make and pronounce findings about the purpose of a statute, or the mischief it was to remedy, without referring to its historical background, knowledge of circumstances and events which comprise the relevant background of a statute is a natural basis for making such findings." Sutherland on Statutory Construction, sec. 48.03 (5th Edition 1992).

The Supreme Court of the United States is in agreement with Hart's argument and understands the **genesis** of the 16th Amendment to be as Hart has described. In the early income tax cases every time a litigant argued that the 16th Amendment authorized a non-apportioned direct tax the Supreme Court said no. This precise question has been before the Supreme Court many times. Had the Appellant's position been true, a new class of taxation would have been created by the 16th Amendment, that of a 'non-apportioned direct tax.' This proposition has been **rejected** and the rejection has been **affirmed** by the Supreme Court. Brushaber and the government claimed that a the 16th Amendment authorized this non-apportioned direct tax in the case of *Brushaber v. Union Pacific R.R. Co.* This assertion was **rejected**. The proposition was again made, and the rejection was **affirmed** by the Supreme Court in Dodge v. Osborn, 240 U.S. 118 (1916), Eisner v. Macomber, 252 U.S. 189 (1919), Stanton v. Baltic Mining Co., 240 U.S. 103 (1916), Thorne v. Anderson, No. 394 October Term (1916), and Tyee v. Anderson, 240 U.S. 115 (1916).

The Supreme Court's ruling in the **Brushaber Case**, that the 16th Amendment provided authority only for an income tax in the nature of an excise tax, harmonized the 16th Amendment with the other taxation clauses of the Constitution. Appellee's contention that there is a direct tax exemption authorized by the 16th Amendment, destroys the harmony of the Constitution.

The Appellee, in its brief for *Peck v. Lowe* acknowledged this when the Appellee argued:

> "It is, however, equally clear that a general income tax is an **excise tax** laid upon persons or corporations with respect to their income.
>
> The all-embracing power of taxation conferred upon Congress by the Constitution included two great classes, one indirect taxes or excises, and the other direct taxes, and that the only limitation upon this power was that of uniformity in regard to indirect, and that of apportionment with regard to direct taxes. It was held that an income tax in its nature is an **excise.**
>
> Here, then, is a clear holding that an income tax is in its nature not a direct tax but an **excise**, and that the Sixteenth Amendment has removed all possibility of turning in into a direct tax by a consideration of the sources from which the income is derived." (emphasis added) Brief for the United States at 14-5, 17, Peck v. Lowe, 247 U.S. 165 (1917).

Peck v. Lowe was about taxing the net income of a corporation that was involved in exporting goods from the United States. The tax was due only when the corporation had a successful and profitable year, when it made an "income." The tax was not on the act of exporting goods. Furthermore it was not a tax on the source as the source was not diminished by the tax. Correctly the Supreme Court correctly ruled the tax to be an excise tax and was constitutional.

But such logic upon which the *Brushaber Case* was decided (which is contrary to the theory upon which the *Pollock Case* was decided) only applies when it is the net income, the severable income, that is diminished by the tax leaving the source whole. Such logic does not apply when the source is diminished by the tax.

Once the source is diminished by an income tax and no privilege attaches, then the income tax is no longer an excise tax but is instead a direct tax. *Eisner v. Macomber.* The Appellee can't have it both ways, in *Peck v. Lowe* arguing the income tax is an excise tax and in the instant case arguing the income tax is a direct tax exempted from the rule of apportionment.

While the Appellee claimed in *Peck v. Lowe* that there was only two classes of taxes authorized by the Constitution with each class subject to a regulating rule, in the instant case the Appellee is arguing that there are three classes of taxes authorized by the Constitution. The third one being a direct tax disencumbered from the rule of apportionment. Such a proposition has been repeatedly rejected by the Supreme Court. *Stanton v. Baltic Mining Co. et. al.*

The tax that the Appellee is trying to collect from Hart is a species of a capitation tax. Capitation taxes are direct taxes and are outside the scope of the Sixteenth Amendment. As pointed out in Hart's opening brief, the three leading authorities on this point are Adam Smith, author of Wealth of Nations (1776), Jacques Turgot, author of Plan d'un mémoire sur les impositions (1764), and Albert Gallatin, author of Sketch of the Finances of the United States (1796). "Judge Cooley speaking of Smith's maxims, says: 'The wisdom of which has secured for them universal acceptance.'" Extracts from the Evidence Proving the Historic Facts at 13, Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1894).

Albert Gallatin had been a member of both the Senate and the House and was Chairmen of the House's Ways and Means Committee. He was also Secretary of the Treasury from 1801 until 1814, first appointed by President Jefferson. He was the third most quoted authority on finances and taxation during the congressional debates on the 16th Amendment.

> "Mr. SUTHERLAND. This view is confirmed by the comments of Albert Gallatin in his Sketch of the Finances of the United States, written a year or two after the decision [of the Hylton case]. He says:
>
> 'The most generally received opinion, however, is that by

direct taxes in the Constitution are those meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense.'" 44 Cong. Rec. 2094 (1909).

"It results that all taxes laid upon property which commonly afford a revenue to the owner, whether such property be in its productive or in any proportion to its value, are direct; a class which will include taxes upon lands, houses, stock and labor; all of which, therefore, must when laid be apportioned among the States according to the rule prescribed by the Constitution." Albert Gallatin, Sketch of the Finances of the United States, pg. 14 (1796).

In Smith's Wealth of Nations, Smith wrote about graduating the capitation tax according to wealth, which had been the practice of both England and France.

"The taxes which, it is intended, should fall indifferently upon every different species of [gross] revenue, are capitation taxes... These must be paid indifferently from whatever revenue the contributors may possess; from the rent of their land, from the profits of their stock, or from the wages of their labor.

Capitation taxes, if it is attempted to proportion them to the fortune or revenue of each contributor, become altogether arbitrary. The state of a man's fortune varies from day to day... His assessment, must in most cases depend upon the good or bad humour of his assessors, and must, therefore, be altogether arbitrary and uncertain.

Capitation taxes, if they are proportioned not to the supposed fortune, but to the rank of each contributor, become altogether unequal; the degrees of fortune being frequently unequal in the same degree of rank." Adam Smith, Wealth of Nations, 538 (Prometheus Books, Amherst, New York 1991)(1776).

A tax on the existence of a person is a capitation tax. A tax on the wage of a person taxes the right of the person to exist as one cannot exist without working. Such a tax is a capitation tax. Ac-

cording to all the relevant authorities, any tax on the gross revenue of a person is a capitation tax.

The *Pollock Rule*, extinguished by the 16th Amendment, is only extinguished for taxes on net income which do not diminish the source. An income tax on the gross income of a person where no privilege attaches is a capitation tax as the person is diminished by the tax; the person is the source. If the source cannot be considered when determining if an income tax on gross wages or salaries is direct or indirect, then what the Government is telling us is "you're not being taxed, only your money is being taxed, so don't worry, be happy." Such a condition defies logic and fits into the reality of George Orwell's world of 1984 where "war is peace, freedom is slavery and ignorance is strength."

The purpose of the 16th Amendment can best be summed up by the 1908 Democrat party presidential plank on the income tax issue which identifies "wealth" as the object of the income tax.

> "We favor an income tax as part of our revenue system, and we urge the submission of a constitutional amendment specifically authorizing Congress to levy and collect a tax upon the individual and corporate incomes, to the end that wealth may bear its proportionate share of the burdens of the Federal Government." 44 Cong. Rec. 3309 (1909).

Each of the following five contentions are true. While any one of the following contentions, standing alone, is fatal to the Appellee's position.

1.) The primary recognized authorities on finance and taxation at the time of the ratification of both the Constitution in 1787-9 and of the Sixteenth Amendment in 1909-13 held the position that a tax on the revenue of a person was a capitation tax. Capitation taxes are outside of the authority of the 16th Amendment and must be apportioned among the several States. There are no recognized authorities upon which the Appellee can rely to rebut this assertion.

2.) The question of whether or not to include direct taxes within the authority of the Sixteenth Amendment, and thereby provide an exception to the apportionment rule for such taxes, was placed

squarely before the Senate. Such question was answered in the negative twice by direct vote of the Senate and twice by objection during debate. Having been rejected by the Senate, the government cannot now claim this authority.

3.) The question of whether or not the Sixteenth Amendment provided authority for an exception to the direct taxation clauses of the Constitution has been squarely placed before the Supreme Court of the United States numerous times. The Supreme Court **rejected** such a contention in *Brushaber* and has **affirmed** such **rejection** in at least five additional cases.

4.) There is no compelling evidence upon which the Appellee can rely to rebut Hart's assertion that the American People never intended to delegate authority to Congress levy a direct tax on wages and salaries as a way to shift the tax burden off of tariffs and taxes on consumption.

5.) There is no compelling evidence upon which the Appellee can rely to prove that the construction to be placed on the Supreme Court's quote in the corporation income tax cases of *Stratton's, Doyle* and *Eisner* where: "Income may be defined as the gain derived from capital, from labor, or from both combined." means that labor equals income within the meaning of the 16th Amendment.

Hart believes the income tax statutes are constitutional, but also limited in scope. Hart is therefore not challenging their constitutionality, only the enforcement of them. For example, wages can be taxed by an excise tax when persons work directly for the government regardless of whether they work in the several States, in a federal district or overseas. If the statutes want to call wages income for this particular fact pattens its fine to do so. Furthermore, when a U.S. citizen lives and works in a federal district, wages may be called income again. Any tax on these wages would be an excise tax as it is a privilege to live and work in such a district.

> "We are therefore of the opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the

Constitution..." Downes v. Bidwell, 182 U.S. 244, 287 (1901).

Congress anticipated these various scenarios when Congress choose to define "United States" and "State" at 26 U.S.C. 7701 (a) (9) and (10) where these terms could have variable meanings depending on the particular fact pattern.

> "**(10) State.** The term 'State' shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title."

Appellee's Brief at 4 quotes Hart as saying "when I read the statutes and regulations, I do not find in them where there is a tax on wages, that's payable by me. It's conceivable there could be a tax payable by someone else, but it's not payable by me." At the time Hart was working for a corporation. Congress has the power to tax corporations for the privilege of doing business in corporate form and to measure the tax by anything Congress chooses to measure it by. Congress could measure the amount of tax due by the percentage of sunny days in Phoenix, Arizona to the whole year as long the same criteria applies to all corporations. Or Congress could measure the tax by a percentage of the wages the corporation paid so long as the criteria was geographically uniform.

Sanctions and Penalties. The Appellee stated, "In his brief to this Court, taxpayer does not contest the merits of the liabilities and penalties determined by the Tax Court of the court's imposition of sanctions against him." Hart did contest such issues in Hart's brief to this Court at page 5 where Hart made reference to his Reply to Mot. for Sanctions in the Tax Court. see Excerpts of Record pg. 6. Hart continues to stand on the argument made in this pleading. Hart also made reference to his Objection to Respondent's Computation for Entry of Decision in his brief at pgs. 5, 33 and 35, (Excerpt of Record at 156) and his Supplemental Reply to Resp't Mot. for Sanctions at page 26 (Excerpt of Record at 47). Hart also continues to stand on the argument made in these pleadings too. A review of these pleadings shows that there is no underlying tax liability and therefore there can be no "additions to tax" penalties nor any sanc-

tions for not paying a tax that Hart does not owe. Hart also quoted 26 U.S.C. 7491, a penalty statute, at page 31. Therefore, Hart requested in his opening brief that this Court abate all penalties and sanctions, or that the case be remanded for retrial, or that the case be referred to the agency with instructions to refund Hart's monies from 1994 with interest.

Although Hart pays numerous taxes in any given week or month, Hart objects to the Appellee calling Hart a 'taxpayer' for the purpose of this controversy.

Hart continues to be at an absolute loss to comprehend which of his authorities or legal arguments are frivolous. Was it the reliance on congressional documents, on prior Supreme Court determinations, or on the obvious intent of the American people when they lobbied for an income tax? Should this Court affirm the Tax Court decision, Hart requests that this Court identify prior cases where the specific authoritative sources upon which Hart has relied have been cited before; and in what cases were the assertions that Hart has made been ruled on before? In extensive research on the issue Hart has never seen cited the majority of the authorities Hart relies on or ever mentioned in the literature or in cases on the income tax issue. Nor has Hart seen many of his points and assertions in the literature either or in other income tax cases. Hart therefore requests that this Court provide a foundation for any determination that Hart is frivolous.

United States Tax Court Rule 142 - Presumption of Correctness. (Omitted in this Appendix)

Conclusion. For the foregoing reasons, and for the reasons stated on Hart's opening brief, the judgement of the Tax Court should be reversed and all monies held by the Commissioner belonging to Hart should be returned to Hart with interest and any other relief the Courts deems appropriate.

Respectfully submitted:

_____

Philip Lewis Hart, pro per

Appendix F

Appellant's Brief to the Tax Court

UNITED STATES TAX COURT

Docket No. 10398-98
Docket No. 16155-98

Philip Lewis Hart,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

PETITIONER'S BRIEF

Petitioner admits he is a **Citizen of the United States** as that term is used in the original handwritten Constitution of the United States at art. I, sec. 2, cl. 2; art. I, sec, 3, cl. 3; art. II, sec. 1, cl. 5; and art IV, sec. 2, cl. 1. Petitioner denies he is a **citizen of the United States** as that term is used in 26 CFR 1.1-1. Petitioner admits he lives in the **United States** as that term is defined at 26 U.S.C. 4612 (a)(4). Petitioner denies he lives in the **United States** as that term is defined at 26 U.S.C. 7701(a)(9). Petitioner has been an **Inhabitant** of one of the several States continuously his entire life as that term is used in the Constitution at art I, sec. 2, cl. 2. Petitioner admits that Congress has the constitutional power to tax Petitioner's wages, salary or compensation for labour or services. Therefore, Petitioner admits that any wages, salary or compensation of Petitioner's is "taxable" should Congress choose to place a tax on them. Petitioner admits that congress can use a variety of mediums to collect a tax including Federal Reserve Notes or sea shells. Petitioner admits that the Internal Revenue Code (IRC) is constitutional and imposes mandatory taxes, among these are

mandatory taxes on wages. Petitioner denies that the IRC has imposed a tax on any wages, salary or compensation of Petitioner's. Given Petitioner's current fact pattern, Petitioner therefore believes he is not a person liable for any tax imposed under the Internal Revenue Code and therefore has no legal duty to pay any IRC tax at this time and is not a "taxpayer" as this term is statutorily defined to be "**Taxpayer.** The term "taxpayer" means any person subject to any internal revenue tax." 26 U.S.C. 7701 (a)(14).

Citizenship. Petitioner was born in Hartford, Connecticut to parents who were both natural born Citizens of the United States. Being a descendant of John Hart, signer of the Declaration of Independence from New Jersey, Petitioner is part of the Posterity mentioned in the preamble of the Constitution. Petitioner's ancestors were the creators of Congress and as such, Petitioner's Citizenship is one of right and is not of a class of citizenship created by and at the pleasure of Congress. Petitioner's class of citizenship is spelled with an upper case "C". Congress' powers over Petitioner are only those granted by the People to Congress as enumerated in the Constitution. "The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people." U.S. v. Cruikshank, 92 U.S. 542 (1875). That there are various classes of citizenship is evidenced by,

> "It has been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union. Those therefore, who had been born and resided always in the District of Columbia or the territories, though within the United States, weren't citizens." Slaughter-House Cases, 83 U.S. 36.

> "There are then, under our republican form of government, two classes of citizens, one of the United States and one of the state. One class of citizenship may exist in a person, without the other, as in the case of a resident of the District of Columbia." Gardina v. Bd. of Registrars of Jefferson County, 48 So.

788 (1909).

"As had been said, citizens of the District of Columbia were not granted the privilege of litigating in the federal courts on the ground of diversity of citizenship. Possibly no better reason for this fact exists than such citizens were not thought of when the judiciary article of the federal Constitution was drafted. It is even more probable that citizens of the United States, occupying the very unusual status that Pannill does, were also not thought of; but in any event a citizen of the United States, who is not a citizen of any state, is not within the language of the Constitution." Pannill v. Roanoke Times Co., 252 F. 910, 914.

Petitioner's, as a Citizen of the United States, is of a entirely different class of citizenship than that of a citizen of the District of Columbia, otherwise known as a "citizen of the United States" whose citizenship was not contemplated by the framers of the Constitution at the time of its writing, and is therefore without the scope of the original document. That Congress may create inferior classes of citizenship without constitutional protection is evidenced by *Balzac v. Porto Rico, 258 U.S. 298 head notes 4 & 7.*

"4. The provisions of the Constitution...do not apply to a territory belonging to the United States which has not been incorporated into the Union; ...

7. The provisions of sec. 5 of the Organic Act, *supra*, for extending federal citizenship (citizen of the United States) to citizens and certain residents of Porto Rico, did not extend the jury system there." P. 307.

Citizenship, of the class found in the original 1787 handwritten Constitution, is one of right. It can not be taken away or unknowingly lost.

"Expatriation is the voluntary renunciation or abandonment of nationality and allegiance... The renunciations not being given as a result of free and intelligent choice, but rather because of mental fear, intimidation and coercion, they were void and of no effect." Kawakita v. U.S., 190 F.2d 506 (1951).

"...no* * * act of congress * * * can affect citizenship acquired as a birthright by virtue of the constitution itself* * *. The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship." U.S. v. Wong Kim Art, 169 U.S. 649, 703.

"...emphasizing that a citizen has a "constitutional right to remain a citizen ... unless he voluntarily relinquishes that citizenship. The only way the citizenship...could be lost was voluntary renunciation or abandonment by the citizen himself. The Court held that because Congress could not "abridge," "affect," "restrict the effect of," or "take... away" citizenship, Congress was "without power to rob a citizen of his citizenship." Vance v. Terrazas, 444 U.S. 252 (1980).

Petitioner has never intended to nor knowingly made any affirmation or declaration, nor taken any oath where Petitioner has renounced his **Citizen of the United States** status.

Construction. Does the term **United States** found at 26 U.S.C. 7701 (a)(9) include the several States of the Union? At 26 U.S.C. 4612 (a)(4) the term "United States" does.

(4) United States. (A) In general. The term "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, any possession of the United States, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

The several States are also included in the definition of State found at 28 U.S.C. 3002 (14).

(14) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of Northern Marianas, or any territory or possession of the United States.

Yet at 26 U.S.C. 7701 (a)(9) and (10) the neither several States nor the 50 States are expressly included. Within the corpus of state & federal law there are some 400 unique definitions of the term "United States." The rules of construction are normally invoked when a new term is used in a statute without a well settled meaning or history. Certainly the terms "state" and "United States" are not new terms with an unknown meaning, yet when used in a statute they have a statutory meaning, hence the tally of 400 unique definitions. With approx. 400 choices to choose from, any time the term "United States" is statutorly used it will have the precise meaning given to it by the words found within the definition. The Supreme Court has ruled "Where the meaning is plain, there is no need for construction." 242 U.S. 468. Therefore, the "plain meaning rule" applies to the use of the terms "state" and "United States." These terms only include those geographical areas expressly noted within there respective definitions.

The above claim is even more applicable to taxing statutes. Taxing statutes at the national level are not casually written by inexperience legislators, but are crafted by nonpartisan experts within the field. Taxing statutes are the most carefully and throughly drafted legislation above all others. As such, taxing statutes are to be strictly construed. 245 U.S. 151 (1917). Participating in the process is the House Ways and Means Committee, Senate Finance Committee, Office of Legislative Counsel for the House, same for the Senate, the Joint Committee on Taxation, the Congressional Research Service and representatives from the IRS and from the Treasury. See exhibit "A" from Sutherland Stat Const 5th Ed. The legislative history of 26 U.S.C. 7701 (a)(9) and (10) shows that it has been visited twice by changing legislation. Both times were to remove the territories of Alaska and Hawaii once they became States. See exhibits BB,BC,BD,BE. Are we to believe that the legions of lawyers who work on taxing statutes have yet to get it right and that these definitions of "state" and "United States" don't mean what they say they mean? There are only 2 possible answers this question, either these legions of lawyers are incompetent, or the words found in the definitions mean only what is expressly stated. Congress would not

have defined the terms if these terms were to have their meaning from common everyday usage. If the IRS can produce enough paper annually to circle the earth 8 times, certainly it is no problem for Congress to provide enough ink and paper to add the 2 words "several States" to 26 U.S.C. 7701 (a)(9) and (10).

> "Humpty Dumpty said that words mean whatever you want them to mean. In the world of nonsense he may have been right. But in the world of sense he was wrong." Henry M. Hart, Jr., Albert M. Sacks, The Legal Process 1188 (Foundation Press)(1994).

Why the **plain meaning rule** applies. As written, the "several States" and the "50 States" are without the definitions of "state" and "United States" found at 26 U.S.C. 7701 thereby maintaining the constitutionally of Title 26. To expressly include the several States within the within these definitions would cause portions of Title 26 to be unconstitutional in that Title 26 would be levying an unapportioned direct tax within the several States.

> "The power of Congress, in the imposition of taxes and providing for the collection thereof in the possessions of the United States, is not restricted by constitutional provision (sec. 8, art. 1), which may limit its general power of taxation as to uniformity and apportionment when legislating for the mainland or United States proper, for it acts in the promises under the authority of clause 2, section 3, article 4 of the Constitution, which clothes Congress with power to make all needful rules and regulations respecting the territory or other property belonging to the United States. Binns v. U.S., 194 U.S. 486; Downes v. Bidwell, 182 U.S. 244." Lawrence v. Wardell, 273 F. 405, 408 (9th Cir.1921).

> "**Inclusio unius est exclusio alterius** The inclusion of one is the exclusion of another. The certain designation of one person is an absolute exclusion of all others. This doctrine decrees that where law expressly describes particular situation to which it shall apply, an irrefutable inference must be drawn that what is

omitted or excluded was intended to be omitted or excluded." Black's Law Dictionary 763 (6th ed. 1990).

The only geographical area expressly included in 26 U.S.C. 7701 (a)(9) and (10) is the District of Columbia. *Lawrence v. Wardell* determined the geographical areas without the several States are of an entirely different class when it comes to constitutional restrictions of taxation. Therefore, when the issue is taxation, unless the "several States" are expressly included, one can not construe them to be included with the District of Columbia (D.C.) when D.C. is the only geographical area expressly noted.

Petitioner assumes the 16th Amendment was ratified. The purpose of the 16th Amendment was to overturn the *Pollock Decision* by way of constitutional amendment.

> "Indeed, in light of the history which we have given and of the decision in the *Pollock Case*, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the *Pollock Case* was decided." Brushaber v. Union Pac. RR. Co., 240 U.S. 1, 18 (1916).

Pollock dealt with a net income tax on the proceeds from real estate and from personal property. All other issues were without the scope of *Pollock* and not incorporated within the questions before the *Pollock* court. Any mention of other issues within the printed case are only dicta and not a part of the decision of the court. Therefore the scope of the 16th Amendment is limited only to the issue before the *Pollock Court*, that of whether or not a tax on net income from real estates and personal property is a direct tax subject to the rule of apportionment.

The Supreme Court has told us how we determine the intent of a portion of the Constitution and the meaning of the words used within it.

> "These words are not defined in the constitution itself. Like other words used in that instrument, we must look for their meaning to the general usual sources and authorities which determine

> the significance of the English words and phrases....It is defined in the Federalist; in the legislative debates; in judicial opinion; in text books of the law, and in the standard dictionaries of the languages. It is not defined by the Congress nor the Executive branch of government. It is defined by the people." Minor v. Hoffersett, 88 U.S. (21 Wall.) 162.

When the American People encouraged their state legislators to ratify the 16th Amendment, was it the understanding of the People that the word "income" as used in the Amendment meant "net income?" Yes!! A tax on net income does not diminish the income's source.

> "Mr. Davies. 'And further, when the word "income" was used, it was meant income that was net. It was not gross income, that could be taxed in the case of some corporations or individuals, but it was in every case the income from whatever source derived, the income as a whole of the taxpayer, and that necessarily must be net income, because the ordinary meaning of the word "income" is not gross income or gross receipts, but net income,...'" Brushaber v. Union Pac, RR. Co. 240 U.S. 1, opening argument for appellant p. 6 (1916). See exhibit "B-F."

Adding force to Mr. Davies assertion is the fact that Congress sent the 16th Amendment was out to the States during the same session Congress passed the Corporation Excise Tax Act of 1909. The Supreme Court has ruled that the word "income" as used in the 16th Amendment has the same meaning as the word "income" as used in that act.

The use of this definition of "income" in the decision of cases arising under the Corporation Excise Tax Act of 1909, and under the Income Tax Act (1913) is, we think, decisive of the case before us. ... It is obvious that these decisions in principle rule the case at bar if the word "income" has the same meaning in the Income Tax Act of 1913 that it had in the Corp. Excise Tax Act of 1909, and that it has the same scope of meaning was in effect decided in *Southern Pac. Co. v. Lowe*, where it was assumed ...there was no difference in its meaning as used in the Act of 1909 and the Income

Tax Act of 1913. There can be no doubt that the word must be given the same meaning and content in the Income Tax Acts of 1916 & 1917 that it had in the Act of 1913. When to this we add that in *Eisner v. Macomber* a case arising under the same Income Tax Act of 1916 which is here involved, the definition of "income" which was applied was adopted from *Stratton's Independence v. Howbert* ...there would see to be no room to doubt that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to in the Corporation Excise Tax Act and that what that meaning is has now become definitely settled by decisions of this court.

> "In determining the definition of the word "income" thus arrived at, this court has consistently refused to enter into the refinements of lexicographers or economists and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term **which must have been in the minds of the people** when they adopted the 16th Amendment." Merchants' L. & T. Co. v. Smietanka, 255 U.S. 509, 518-9 (1921).

> "The British income tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering that they are quite without value in arriving at the construction of the laws here involved." *ib.* at 521-2.

The British, unlike in America, considered "labor" to be in and of itself "income." Because this was not the belief in America, the court rejected the British cases. Nor did the British have the constitutional obsticles of direct vs. indirect taxes to contend with. In *Eisner v. Macomber*, the court in defining the meaning of the word "income" said:

> "The fundamental relation of "capital" to "income" has been much discussed by economists, the former being likened to the **tree** or the **land**, the latter to the **fruit** or the **crop**; ....For the present purpose we require only a clear definition of the term

> "income," as used in common speech, in order to determine its meaning in the Amendment. After examining dictionaries in common use... we find little to add to the succinct definition adopted in 2 cases arising under the Corporation Tax Act of 1909 (*Stratton's Indep. v. Howbert*, 231 U.S. 399, 415; *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185)- "Income may be defined as the gain derived from capital, from labor, or from both combined." Eisner v. Macomber, 252 U.S. 189, 206-7 (1920).

The *Doyle Case* at page 185 relies entirely on the *Stratton Case*. The *Stratton Case* is through in its analysis of the meaning of the word "income." Stratton cites *Cornell Univ. v. Davenport*, 30 Hun, 177, 184: "The income from an investment is that which it earns, remaining itself **intact**." Stratton also cites *Wilcox v. County Commissioners:*

> "The income meant by the statute is the income for the year, and is the result of the year's business. It is the net result of many combined influences: the use of capital invested; the personal **labor** and **services** of the members of the firm; the skill and ability with which they lay in, or from time to time renew their stock; the carefulness and good judgement with which they sell and give credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country. To express it in a more summary and comprehensive form, it is the creation of capital, industry and skill." Wilcox v. Co. Commissioners, 103 Mass. 544, 546 (1870).

In other words, labor and services are only components of a greater machinery. If that machinery is operated with skill, then income will result. Labor in and of itself is not income, nor is capital in and of itself income. If there's a tax on houses and an assessor visits a property only to find a pile of 2 x 4's and no house, can the assessor levy a tax on the 2 x 4's? No, the tax is on houses, not 2 x 4's!! In *Eisner* the court gave us even more to work with:

"The Government, ... placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next 3 words was either overlooked or misconceived. *"Derived-from-capital"*;- "the *gain-derived-from-capital,"* etc. Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being *"derived,"* that is, *received* or *drawn by* the recipient (taxpayer) for his *separate* use, benefit and disposal." *id.*at 207.

If all earnings from labor are income, and all income was severed from the man who earned it, the man would die. He could not feed, cloth or care for himself. He would not remain "**intact.**" As in the *Cornell Case* cited earlier, whether it be labor or capital the underlying source of the income must remain whole before there is income to be severed.

"Mr. BAILEY. I believe that in earning an income by personal service every man consumes a part of his principal. And that fact ought always to be taken into consideration. The man who has his fortune invested in securities may find in a 100 years, if he spent his income, that fortune still intact, but the lawyer or the physician or the man engaged in other personal employment is spending his principal in earning his income. That fact ought under every just system of income taxation to be recognized and provided against." 44 Cong. Rec. 4007 (1909).

Mr. Bailey, Senator from Texas, was a strong advocate for the 16th Amendment. According to *Sutherland on Statutory Construction*, the opinions of those Congressman who support a measure carry additional authority in judicial analysis.

And finally, when the *Eisner Court* makes reference to its **tree, land, fruit, crops** analogy, it draws from the *Waring v. City of Savannah* upon which the *Stratton Case* relied:

"The fact is, property is a tree; income is the fruit; labor is a tree; income the fruit; capital, the tree; income the fruit. The

> fruit, if not consumed [severed] as fast as it ripens, will germinate from the seed...and will product other trees, and grow into more property; but so long as it is fruit merely, and plucked [severed] to eat.. it is no tree, and will produce itself no fruit." Waring v. City of Savannah, 60 Ga. 93, 100 (1878).

Relying on this case, it is obvious the *Eisner Court* referred to labor not as income in and of itself, but in the same class of things as capital and property. A tax that dimishes the value of capital or property, absent a privilege, is a direct tax. A tax that diminishes the value of labor is a direct tax within the constitutional meaning of the word direct. Petitioner agrees with previous rulings of the Tax Court that a tax on labor is a direct tax. Petitioner disagrees with the Court that this direct tax is authorized by the 16th Amendment. See exhibit "B-G," Position Paper on: Flat Tax on Wages and Salaries.

The People. The People of America who ratified the 16th Amendment understood the population to be divided into three classes, that of wage-earners, farmers and those who lived off of incomes. Many called those who lived off "an income" the "idle rich." See exhibit xx They understood the purpose of the 16th Amend. to do exactly what the 1908 Democratic Party Platform said it would.

> "We favor on income tax as a part of our revenue system, and we urge the submission of a constitutional amendment specifically authorizing Congress to levy and collect a tax upon individual and corporate incomes, **to the end that wealth may bear its proportionate share of the burdens of Federal Gov't."** 44 Cong. Rec., 3309 (1909).

Harry Truman said "Platforms are contracts with the people." In *Goodrich v. Edwards* we read,

> "It must reasonably be presumed that Congress, when it proposed the 16th Amendment, and the state legislatures, when they ratified it, intended to adopt this [*Grey v. Darlington*] judicial interpretation and definition of the word income." Goodrich

v. Edwards, 255 U.S. 527, 528 (1921).

Alabama, the first state to ratify the 16th Amend., set the precedent for what the state legislatures understood the scope of the amendment to be. The following appeared in the New York Times.

> " In introducing the measure to the House, Col. Bulger,... stated that he was "anxious to see Alabama the first State in the Union to give her indorsement to the 16th Amend. to the United States Constitution." The only interruption to his speech was a query by Rep. J.T. Glover...who wanted to know if the amendment would affect salaries. Col Sam Will John...responded it would not." Income Tax Voted in Alabama House, N.Y. Times, p.1, August 3, 1909.

The scope of the 16th Amendment does not provide authority for an unapportioned direct tax on wages and salaries. Yet the apportionment clause only applies within the several States. Congress is therefore free to levy a direct tax on wages and salaries withing the United States yet without the several States. This is why the construction to be given to 26 U.S.C. 7701 (a)(9) and (10) is that of the plain meaning rule, which is to construe it only to include only those items expressly stated.

The IRS agrees. The Individual Master File for Petitioner speaks powerfully in support of Petitioner's argument as it is full of evidence indicating that Petitioner does not have a filing requirement nor a tax liability. See the Affidavit by Mr. Patrick Lynch, exhibit "A" of the Motion to Reconsider.

Having spent an enormous amount of time and effort in the study of these issues, and having had much correspondence with Respondent, Petitioner should have by this time become aware of the taxing statutes and regulations that impose a tax on Petitioner, should there in fact be such a tax. Petitioner asserts there isn't one. But Respondent claims there is. If there is such a statute and regulation imposing a tax on Petitioner, then Petitioner has been denied a republican from of government as Petitioner is liable for a

tax under a secret law.

Petitioner is also aware that much of Title 26 actually pertains to Title 27, Alcohol, Tobacco and Firearms (ATF). Which code sections pertain to ATF and why they are found in the IRC Petitioner can't get into in a 10 page brief, although such facts are germane to Petitioner's case. Consequently, Petitioner objects to the limitation of 10 pages when the issues are so complex and the code and regulations so voluminous. Petitioner incorporates all documents that Petitioner filed with the Court into Petitioner's argument.

Signed:_____ Date_____
Philip Lewis Hart

Appendix G

Constitutional Income: Do You Have Any?
Chapter 6 The 16th Amendment
By Phil Hart

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"Harmony. Preserving a statute or part of a statute against repeal by another statute or part of a statute by construction which reconciles the statutes and parts with one another so that effect may be given to all provisions."

—50 American Jurisprudence, 1st Statutes § 363.

Lawyers and legislators are artisans who use words as their medium. Just as a carpenter will construct a house out of wood,

metal, stone and glass; so the lawyer/legislator constructs a statute out of words and phrases. We might call the latter "wordsmiths."

There are only three possible constructions for the 16th Amendment. For clarity, these three are shown in the figures that follow. The position of the government and the lower courts is that the 16th Amendment provides for the levying of an income tax uninhibited by either of the two constitutional rules that limit government's taxing power. If this were true, then the 16th Amendment would have given Congress a new power of taxation.

The position of the author and of the Supreme Court is that the 16th Amendment created no new taxing power or authority but only clarified the classification of a tax on net income as an indirect tax.

The figures on the following page use the term, "universe of all possible taxes." This is a term from statistics. It means that all possible known taxes are included in our example. Our Constitution gave Congress plenary taxing authority. In other words, Congress can levy any possible tax known to man. The question Congress must resolve prior to levying any tax is, "what constitutional rule applies to the tax—the rule of uniformity, or the rule of apportionment?" The IRS would have us believe that no rule applies to the income tax. Following are the three possible constructions of the 16th Amendment:

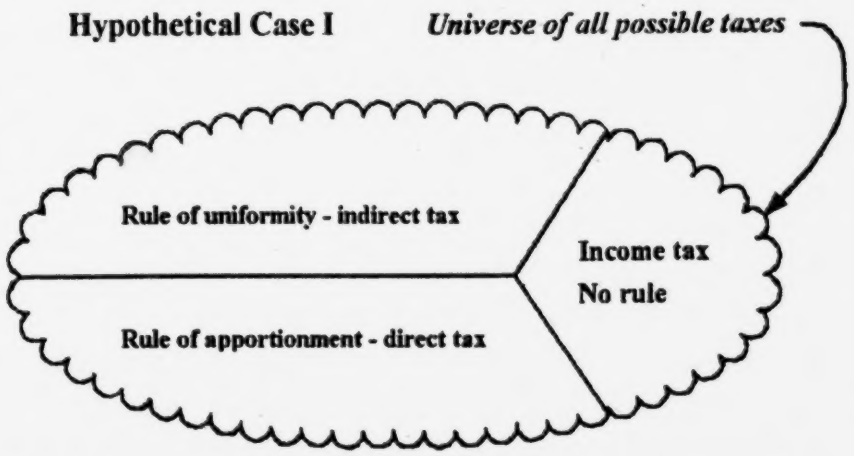

Figure 6.1 - Income tax creates a new category of taxation.

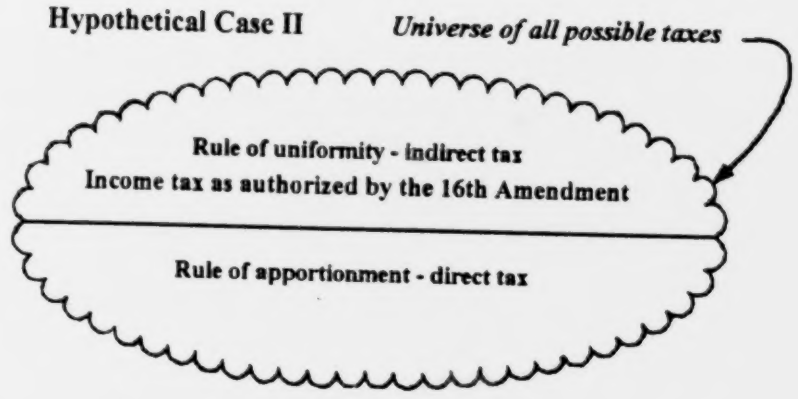

Figure 6.2 - Income taxes restricted to indirect taxes.

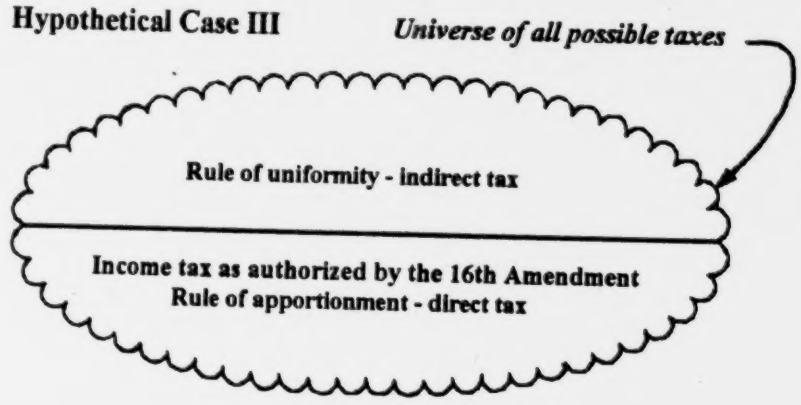

Figure 6.3 - Income taxes restricted to direct taxes.

If our form of government was not a constitutional republic with limited enumerated powers, we could have Monte Hall from the TV game show *Let's Make a Deal* help us choose which of the three cases apply. Is it door #1, #2 or #3? Instead we have a method of legal analysis available to us whereby sticking to the rules of our system of American jurisprudence we will arrive at the correct answer.

Harmony

Because every law must have authority and because the law must "make sense," the law cannot be in conflict with itself. The law must be in Harmony. What is Harmony?

Suppose you are a building contractor and you're building a house. The floor plan (bird's eye view) shows three windows on the north side of the house. Then you look at the plans for the north elevation (this is the drawing of the north side of the house) and this drawing shows no windows at all. Well, there is a problem isn't there? Does the contractor order the windows and install them? What if it was not the intent of the owner or the architect to have the windows on the north wall? The contractor must resolve the apparent discrepancy in the plans. He must ask the owner or architect to correct the drawings so that every sheet of the drawings is in "Harmony" with every other sheet.

Now suppose the parents of a 15-year-old girl prohibit their daughter from smoking cigarettes. The rule is laid down whereby if she is caught smoking cigarettes she is grounded for two weeks. Now the girl gets caught and is grounded by dad. Not wanting to miss an important social event, daughter asks mom if she can go. Mom's a softy and says yes, but dad says no. What's the problem? The problem is mom and dad are not in "Harmony." They are in conflict.

In order for a constitutional system of government to work, all the written laws of the land must be in Harmony with each other. If the laws of the land were in conflict with one another, what would be the use of having any laws at all? We would return to the rule of the jungle or a warlord type of power system, and the law would be determined by whoever has the most power, not by the written word.

On the issue of national taxation, we have four locations in the Constitution where the power of Congress to lay and collect taxes is defined. Each of these sections must be in agreement, in Harmony, with each other section. Otherwise the result will be confusion and chaos. Where there is a conflict of law, we look to the

greater legal authority for clarification. In this case, our authority is the United States Constitution. Where there appears to be a conflict within the Constitution, we look to the intent of the Framers, or in the case of an Amendment to the Constitution, we look to those who debated and voted on the Amendment and to the understanding of the People as they expressed to their elected representatives their will on the issue. There is a reason why the Constitution mandates at article 1, section 5, clause 3 that Congress keep a journal of its proceedings:

> "Rejection by the legislature of certain terms in a statute has been regarded as conclusively showing an intent that the act as passed should not embrace the matter referred to. There is no doubt that where the language of a statute or constitutional provision is not plain, and different meanings may plausibly be attributed thereto, one of the most satisfactory methods of ascertaining the intention of the framers of the instrument is by resort to the amendments and changes thereof, as shown by the official records; and consideration of such extrinsic material is not open to the objections, subsequently discussed, to resort to debates or explanatory statements of a measure in the course of its passage through a legislature or constitutional convention. The rejection of proposed amendments may be the most significant in determining the meaning of an uncertain statutory or constitutional provision." Annotation, Resort to Constitutional or Legislative Debates, Committee Reports, Journals, etc., as aid in Construction of Constitution or Statute., 70 American Law Reports 5, 22-25.

On the issue of the meaning of the various provisions of the Constitution, the Supreme Court said:

> "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted." Mattox v. U.S., 156 U.S. 237, 243 (1895).

It is obvious the construction of the 16th Amendment leaves much to be desired. The effect of the amendment was debated at the time it was drafted, debated during the ratification process, and

is still unnecessarily being debated today. This book would not need to be written had its construction been more clear, and had the terms of that amendment been qualified by the amendment itself.

> "As the case stands the proposal [the 16th Amendment] ought to be negatived [sic] even by those who favor an income tax pure and simple. No law should be enacted whose meaning is disputed before enactment, for whatever construction comes to be placed upon it, there is ground for disappointment and ill feeling." Editorial, The Income Tax, N.Y. Times, pg. 8, April 15, 1910.

> "[It] is not whether the principle of an income tax is sound, but whether, even if the soundness of that principle be wholly assumed, the amendment actually proposed will secure its applications. Until that question is definitely answered, it is pure nonsense to argue the merits of an income tax. The more thoroughly we may believe in an income tax, the more absurd it would be for us to give the assent of the State of New York to an amendment that may be declared void as soon as it reaches the Supreme Court. The amendment that has been sent to our Legislature by Congress is clearly open to that objection." Editorial, The Gist of the Question, N.Y. Times, pg. 12, May 3, 1910.

The legal profession also understood at the time of the debate over ratification of the 16th Amendment that the construction of the amendment was poor. Quoting from the *Yale Law Journal*:

> "It would seem as if the Supreme Court, in construing the United States Constitution as it shall be after the adoption of the proposed amendment, will find itself in the midst of inconsistent and contradictory provisions which cannot be construed in Harmony with each other. It will be presented with contradictory alternatives, one of which it will have to adopt. Fortunate, indeed, will be this country if the Supreme Court, under these circumstances, shall boldly override the unqualified language of the proposed amendment and exclude from its operations an

income tax levied on the instrumentalities of the States. Yet to do this will be a violent stretch of its judicial authority. But what are we to say of an instrument whose provisions and grants are so inharmonious and inconsistent that the Supreme Court cannot construe one part thereof without the contradicting and doing violence to the other, nor can it uphold the other without boldly overriding and nullifying the first?

"Constitutional, indeed, the imposition of an income tax will be, yet, nevertheless, this amendment is inherently improper under the limitations which ought to guard the concessions of authority to our federal government. In that matchless code, called by one of England's greatest statesmen 'the most wonderful work ever struck off at a given time by the brain of man,' this amendment will be an anomaly. In an otherwise harmonious instrument which speaks of a government of enumerated powers seeking to preserve the dignity and vitality of sovereign States, this provision will stand out as the one discordant note, inconsistent with all that has gone before, unexplained, uncalled for, unnecessary, the only grant to the federal government of unrestrained and arbitrary power in respect of taxation over every State and every citizen within those States." Arthur C. Graves, Inherent Improprieties in the Income Tax Amendment to the Federal Constitution, 19 Yale Law Journal 505, 532 (1910).

"A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to [net] income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts." Eisner v. Macomber, 252 U.S. 189, 206 (1920).

From its beginning, Senate Joint Resolution No. 40, a.k.a. the 16th Amendment, had questionable construction. The primary is-

sue was its unqualified language and in particular the meaning of the phrase "from whatever source derived." Was it the intention of the People, the state legislatures, and the Congress to include all things within this meaning?

> "If it is desired to safeguard the rights of the States, and protect them with regard to their own securities and those of their municipalities, it is a very simple matter to frame an amendment which will be unambiguous...and appreciating the supreme importance of an amendment to the Federal Constitution, we ought to be able to express ourselves without doubt in respect to a matter of fundamental concern to the States." Gov. A.E. Wilson on the Income Tax Amendment, N.Y. Times, pg. 13, Feb. 26, 1911.

In support of the 16th Amendment, Republican Congressman Picket of Iowa, who was obviously full of baloney said:

> "The resolution [S.J.R. 40] is simple in construction and covers but one subject and one purpose. It is formulated in clear and unambiguous terms, leaving no possibility for doubtful construction. It involves only the power to impose an income tax." 44 Cong. Rec. 4395 (1909).

(Either the politicians of that day could not be trusted, or later politicians corrupted the words. Most likely it is both.)

> "As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income. *Brushaber v. Union Pac. RR. Co.*, 240 U.S. 1, 17-19; *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 - 113;" Peck & Co. v. Lowe, 247 U.S. 165, 172-173 (1918).

On its face, the 16th Amendment could have multiple interpretations. We are fortunate in that the Supreme Court settled the question in the cases of Brushaber v. Union Pac. R.R., 240 U.S. 1 (1917) and the Tyee Realty Co. v. Anderson, 240 U.S. 115 (1916) cases such that the effect of the 16th Amendment is to nullify the theory, relied on in *Pollock,* that a tax on net income is a tax on the source

of the income. Since an income tax, when the word "income" is used properly, leaves the source of the income undiminished, an income tax is inherently an indirect tax and is subject to the rule of uniformity and not the rule of apportionment.

Before we move on it is worth noting that during the ratification process there was very little debate over the meaning of the word "income." This was so because everyone knew what this word meant; it meant what we call today "unearned income," and/or profit severed from the source.

> "Apparently the Commissioner confuses the term 'profit' with the term 'income.' 'Income' may necessarily be 'profits,' but 'profits' are not necessarily 'income.' The Commissioner uses the term 'sale of *capital* assets,' both in sections 100 and 105, from which it appears that the 'profit' of which he speaks is in fact converted capital and not 'income.'" Brief for Stratton's Independence Limited at 14, Stratton's Independence v. Howbert Ltd., 231 U.S. 399 (1913).

The average man who labored for a living earned a wage, or if he was lucky, a salary. He did not have "an income." "The poor man does not regard his wages or salary as 'an income.'" Gov. A.E. Wilson on the Income Tax Amendment, N.Y. Times, pg. 13, Feb. 26, 1911. Only those who were idle during the work week, yet still made money had an "income." Unfortunately, it appears since everyone knew what income meant, there was little concern that the word income would later be redefined.

Suppose it was of interest to you to determine what percentage of Americans living during the period 1909 to 1913 thought that humans lived on Mars? If you looked in newspapers, magazines, and scientific journals of the time, how much evidence would you uncover? Probably none, and the reason for the lack of evidence is obvious—humans had no way of getting to Mars, so the whole notion was preposterous. So it is with the idea that wages are income. There is little evidence to say that it isn't, because no one in their wildest dreams ever thought wages would be taxable under the 16th Amendment. It was not an issue that was debated.

Hypothetical Case I: No Rule

We will address the Figure 6.1 scenario first, being that no Constitutional rule applies to the levying of an income tax. If the 16th Amendment relieved income taxes from the rule of apportionment but did not make them subject to the rule of uniformity, then no rule applies. The idea that a government of a free people can have an unlimited power to levy any kind of tax is unthinkable. The idea is rejectable on its face. Such a condition would render to shreds the fabric on which our Constitution is written.

> "Liberty, it has been well said, depends, not so much upon the absence of actual oppression, as on the existence of Constitutional checks upon the power to oppress. These checks should not be destroyed or impaired by judicial decisions." Maxwell v. Dow, 176 U.S. 581, 617 (1900).

> "Unrestricted power of taxation is the greatest power over accumulated wealth, manufacturers, industry, and personal freedom which any government can have; for liberty, as Hampden found out, cannot be worth much to a man who may be taxed in any way some other man pleases." Congress and the Constitution, The Nation, page 214, March 21, 1895.

For Hypothetical Case I to be correct, the 16th Amendment would have had to create a new class of taxes—a new creature of tax if you will.

> "Thus, in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.
>
> And although there have been, from time to time, intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has

> as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited a thorough investigation into sources of revenue." Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 557 (1895).

In an article entitled "The Income Tax and the Constitution" appearing in the *Harvard Law Review* in 1907, Edward Whitney wrote:

> "Apportioned taxes have turned out a failure. They are difficult enough to assess within the limits of a state, and under control of a state board of equalization. They have been tried by the nation and each trial was a failure. The last direct tax was paid back again. There will probably never be another. Whatever taxes are levied in the future will be levied under the rule of uniformity. If we are to amend the Constitution, a matter now so often discussed, we should not try to tinker (with) it by introducing a specific exception to a broken down general rule. Amendments to the Constitution should conform to its main plan. They should be drawn on broad lines, and not introduce a multitude of special cases." Edward Whitney, The Income Tax and the Constitution, 20 Harvard Law Review 280, 292 (1907).

The rule of apportionment is not a broken down rule, but instead is a rule meant to keep our government a government of limited form, without the funding to provide "a Multitude of New Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance." (The Declaration of Independence.)

At the time the Constitution was written, we had just fought the War of Independence. One of the primary grievances against King George was a heavy tax burden. The framers of the Constitution set up a national government with limited powers and limited duties. It was not going to cost a lot of money to run a government of limited duties. The previous national government organized under the Articles of Confederation had no power of taxation. Most of the responsibility of government was to be the domain of the states, not the national government. The states were free to raise revenue through direct taxation if they chose to do so. The rule of apportionment has

worked as it was intended to work. It has the effect of what Thomas Jefferson so aptly stated, the rule "binds the government with the chains of the Constitution."

> "Here we find the propositions of either Morris or Rutledge the same fundamental principle of American government, whose justice, it seems, was never objected to by a single member of the conventions - that the power to impose taxes ought not to be committed to a majority of mere members with no safeguards for its exercise, making possible the imposition of burdens on a certain portion of the community to the exclusion of the remainder. The discussion which took place during those days in July in the convention shows that 'those patriotic men well knew that the unrestrained and unregulated power of taxation had been, in all the experience of the world, the chief instrument of oppression and tyranny, and while the power was indispensable to the existence of the nation, it was not the less necessary that it should be kept with definite bounds.' Sen. George F. Edmunds, *Salutary Results of the Income Tax Decision,* 19 The Forum 513, 516 (1895)." Arthur C. Graves, Inherent Improprieties in the Income Tax Amendment to the Federal Constitution, 19 Yale Law Journal 505, 513 (1910).

The essence of a constitutional form of government is one of limited powers delegated to government. All gains in the freedoms of man in western civilization have been at the expense of much toil, blood and treasure. In all cases, beginning with the Magna Carta in 1215, the significant gains have been evidenced by written documents which delineated, and were meant to secure, the freedoms and liberties of those who fought for them. It is unthinkable that a people, who secured their freedom only by spilling their own blood on the battlefield, would hand over to any government an unlimited power to tax the gross receipts of their labor. In our time, our freedoms and liberties are secured by our Constitution. In pertinent part, *Black's Law Dictionary* defines a "Constitution" as:

> "The organic and fundamental law of a nation or state, which may be written or unwritten. Establishing the character and con-

> ception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulation, distributing, and *limiting* [emphasis mine] the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers." Black's Law Dictionary, 311, (6th ed. 1990).

In Ballentine's we find the definition of "constitutional liberty" to be:

> "The liberty guaranteed under the American system of constitutional government; a very broad and extensive concept, embracing not only freedom from physical restraint, but the right of man to be free in the enjoyment of the faculties with which he is endowed by the Creator, subject only to such restraints as are necessary for the common welfare. 16 American Jurisprudence, 2nd Series, Constitutional Law § 358, 359." Ballentine's Law Dictionary, 253 (3rd ed. 1969).

How can a man be free and secure to enjoy anything, if over half of his earnings are taxed away; if there is no limitation on government's ability to tax him? When a man pays a tax on his right to exist he is not free.

> "It must be conceded that there are rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, liberty and property of its citizens, subject at all times to the disposition and unlimited control of even the most democratic depository of power, is after all a despotism. It is true that it is a despotism of the many - of the majority, if you chose to call it so - but it is not the less a despotism." Loan Ass'n. v. Topeka, 87 U.S. (20 Wall.) 655, 665 (1874).

If the People, when they ratified the 16th Amendment, delegated to the Congress an unlimited and unrestricted power to tax income and to tax the sources of income, how can such power be consistent with a constitutional form of government? Such a delegation of power would constitute a voluntary acceptance of the status of sla-

very wholly inconsistent with the American system of constitutional government. It is also arguable that such a conveyance of power would be unconstitutional as the purpose of the constitution, as stated in its preamble, is to "secure the Blessings of Liberty to ourselves and our Posterity." Is it constitutional for one generation to give an unrestricted power to tax income and to tax the sources of income to the government and thereby make the next generation destitute? When one entity has the power to potentially take 100 percent of the gross receipts of another entity, isn't the latter in slavery to the former?

The idea that the American People granted to government an unlimited and unrestricted power to tax income is inconsistent with our form of government and is rejectable on its face, and was rejected by the Supreme Court in the *Brushaber Case*.

> "But it is clearly the result that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to *authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity,* thus giving power to impose a different tax in one state or states than was levied in another state or states. This result, instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our constitutional system and multiply confusion." Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 11-12 (1916).

Analyzing this passage out of the Supreme Court's *Brushaber Opinion* we see that the Court addressed the issue of Harmony by

the statement that they could not sanction "one provision of the Constitution to destroy another." If the 16th Amendment provided an exception to the Constitution's direct taxation clauses, then the Constitution would not be a harmonious document. The Constitution would have clauses in conflict with each other as the direct taxation clauses would have been in conflict with the 16th Amendment.

Next let's analyze the statement, "authorizing a particular direct tax not subject either to apportionment or to the rule of geographical uniformity..." Such a tax freed from any constitutional limitation would constitute an expansion of congressional taxing authority. It would be a new species of constitutional tax.

During the ratification process, the 16th Amendment came under much criticism. The chief complaint was the unqualified language of "from whatever source derived." Governor Hughes of New York, who later became a Justice of the Supreme Court, saw this phrase as a threat to the sovereignty of the several States. Gov. Hughes feared the 16th Amendment would give the national government the power to tax state debt instruments and the instrumentalities of the states. In order to address this criticism of Gov. Hughes', Senator Borah of Idaho presented Senate Resolution No. 175 to the Senate which would authorize the Senate Judiciary Committee to study the issue raised by Gov. Hughes and to render a report to the Senate. This was done on February 10, 1910, fully 7 months after the 16th Amendment was sent out to the states for ratification, yet still three years before it was purportedly ratified. In presenting his request for S.R. No. 175 to the Senate, Senator Borah explained the purposes of and the power of the 16th Amendment. The following are some of Senator Borah's remarks he read from a prepared speech given on the Senate floor:

> "I submit for the consideration of the Senate, first, that this amendment, if adopted, will add nothing to the power of the National Government to lay and collect taxes in the way of power; that the power of the National Government at the present time, as I have said, is full, complete, unlimited, and unfettered,

save as to exports from the States, which has nothing to do with the argument here.

"It is true that there are two rules with reference to the manner in which the Congress shall exercise the power - that of uniformity and that of apportionment - but as to the power itself, putting aside for the moment the manner of its exercise, I submit that the power is at the present time vested in Congress without any limitation, unfettered in every sense of the term." 45 Cong. Rec. 1695 (1910).

Senator Borah continued:

"Third, the amendment did not deal, does not purport to deal, and was not intended to deal with the question of power. It intended to deal, and does deal, alone with the manner of exercising that power which is already complete, that which is already without any limit. The sole obstacle to be removed by those who sought to change the Constitution was that of apportionment. No one has ever contended that it was not within the power of Congress to lay a tax upon incomes. That power has belonged to Congress from its organization, under the original taxing power of Congress." id. at 1695.

"Thus the whole power of taxation rests with Congress. When you exclude exports from States and conform to the rule of uniformity and of apportionment, there is no limitation upon the taxing power of the National Government as it exists at the present time. I submit that it would be difficult to find language which would convey more than the full and complete power which is now conferred by the Constitution." 45 Cong. Rec. 1696 (1910).

Borah again:

"In conclusion, on this phase of the subject, I submit:

First. That the proposed amendment adds nothing to the taxing power of the National Government. This power was complete, unfettered, plenary before. It can be no more than that should this proposed amendment be adopted.

Second. The proposed amendment does not deal or purport to deal with the question of power which is already complete, but simply with the manner and method of exercising and using that power.

Third. No one has ever questioned the power of the National Government to lay an income tax, for, as was said by Justice White, the question has always been 'whether an admittedly unlimited power to tax has been established according to the instruction as to the method,' and it was to remedy the method alone [to overturn Pollock] that the amendment was submitted.

Fourth. The words 'from whatever source derived' add nothing to the force of the amendment. It would, in constitutional parlance, be just the same if it said 'to lay and collect taxes on incomes without apportionment,' for who could then say that you would not have the right to lay taxes upon all incomes? The present taxing power would not be a particle stronger if it stated 'to lay and collect taxes upon all property from whatever source.'

Fifth. To construe the proposed amendment so as to enable us to tax the instrumentalities of the State would do violence to the rules laid down by the Supreme Court for a hundred years, wrench the whole Constitution from its ***harmonious*** [emphasis mine] proportions and destroy the object and purpose for which the whole instrument was framed.

Sixth. To construe it to cover those incomes from sources within the jurisdiction and control of the sovereignty laying the tax is to construe it in ***Harmony*** [emphasis mine] with the principles given us by Marshall and followed from that hour to this." 45 Cong. Rec. 1698 (1910).

Senator Borah was one of the principal proponents of the 16th Amendment. He was very vocal in the debates in Congress over the issue. Senator Borah even wrote a book about income taxes. Could he have stated any more clearly that the 16th Amendment did not create a new power of taxation? I don't believe he could have. He also made it clear that even though the Amendment used the language "from whatever source," there were still sources that were outside the authority of the Amendment. In fact, the language

the Supreme Court used in stating its opinion on this point, in the *Stanton v. Baltic Mining Co. Case*, seems to have been taken from Senator Borah's speech to the Senate on February 10, 1910.

> "By the previous ruling (*Brushaber Case*) it was settled that the 16th Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged..." Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916).

The *Pollock Court* had taken income taxes out of the class of indirect taxes (excises, duties and imposts) and had placed income taxes in the class of direct taxes. Now remember the *Pollock Case* **only** dealt with income taxes on the net income from real estate and personal property. Because the *Pollock Decision* was obnoxious to the American People, the American People sought to overturn the *Pollock Decision* by way of a constitutional amendment.

With the Congress and the Supreme Court in agreement we can therefore conclude the following to be true after the purported ratification of the 16th Amendment:

1. Under our form of constitutional government, there remain two great classes of taxes; that of direct taxes and that of indirect taxes otherwise known as excises, duties and imposts.

2. Capitation, and other direct taxes, must be apportioned among the several States.

3. Indirect taxes must be uniform throughout the United States.

4. Taxes on incomes, when the word "income" is used in its "constitutional sense," regardless of their source, are indirect taxes of a species known as excises.

5. Constitutional income taxation does not tax the source of the income as the tax is only on net income leaving the source of the income undiminished by the tax.

6. The purpose of the 16th Amendment was to negate the theory upon which *Pollock* was decided, the theory being that a tax on net income was also a tax on the source of the income.

Hypothetical Case III:
Income Tax is a Direct Tax

We shall now look at Hypothetical Case III where it is alleged the 16th Amendment provides authority for a direct tax while being relieved of the requirement of apportionment. The starting point is to determine whether or not the income tax provided for by the 16th Amendment is a direct tax, keeping in mind that a tax "on incomes" and a tax "on sources" are two different types of tax. A tax "on incomes" diminishes the income severed from the source. A tax "on sources" diminishes the source.

The 16th Amendment was called Senate Joint Resolution No. 40 as it moved through Congress for Congress' approval. It had a predecessor known as Senate Joint Resolution No. 39 which read:

> "The Congress shall have power to lay and collect *direct* [emphasis mine] taxes on incomes without apportionment among the several States according to population." 44 Cong. Rec. 3377 (1909).[1]

The immediate response to S.J.R. No. 39 was criticism from Senator Mr. Laurin who stated:

> "I think if the Senator from Nebraska will change his amendment to the Constitution so as to strike out the words 'and direct taxes' in clause 3, section 2, of the Constitution, and also to strike out the words 'or other direct' in clause 4 of section 9 of the Constitution, he will accomplish all that his amendment proposes to accomplish and not make a constitutional amendment for the enacting of a single act of legislation." id. at 3377.

Senator Brown's response was:

> "That may be true, Mr. President, but my purpose is to confine it to income taxes alone, and to forever settle the dispute by referring the subject to the several States." id. at 3377.

It is clear that if Congress intended to provide constitutional

authority for the levying of an indirect tax on income and a direct tax on the source of income, such authority would have been enumerated within the income tax amendment. When S.J.R. No. 39 was replaced by S.J.R. No. 40, which ultimately became the 16th Amendment, the term "direct taxes" was replaced with only "taxes." The Senate therefore rejected the idea of making the 16th Amendment apply to direct taxes.

There is more. S.J.R. No. 39 had its own predecessor known at S.J.R. No. 25 which proposed to amend the Constitution and read as follows: "The Congress shall have power to lay and collect taxes on incomes and inheritances." id. at 1568. This proposed amendment was also introduced by Senator Brown from Nebraska who made a speech at the time of its introduction. As in S.J.R. No. 39, the very next statement made after the introduction of S.J.R. No. 25 was from Senator Rayner of Maryland who raised the issue of Harmony with the direct taxation clauses of the Constitution. Senator Rayner stated:

> "In looking at the joint resolution I see that it reads 'The Congress shall have power to lay and collect taxes on incomes.' It has that power now. Congress has the power now to lay and collect taxes on incomes and on inheritances.
>
> "I will call the Senator's attention to the fact that unless you change the clause of the Constitution which provides for apportionment [of direct taxes] the joint resolution would not repeal that clause. The two clauses would stand *in pari materia* together and you would still have an apportionment." 44 Cong. Rec. 1568-9 (1909).
>
> The definition of *"in pari materia"* is:
>
> "Statutes which relate to the same subject or object are *in pari materia*, although they were enacted at different times and it is a fundamental rule of statutory construction that such statutes should be construed together for the purpose of learning and giving effect to the legislative intention." (citation omitted) Ballentine's Law Dictionary, 632 (3rd ed. 1969).

It is clear with S.J.R. No. 39 and S.J.R. No. 25 that any income tax amendment that was going to provide for a direct tax on the source of income, in the constitutional meaning of the term "direct tax," would have to conform to constitutional clauses requiring apportionment of direct taxes. Either that or the direct taxation clauses would need to be struck from the original document. The principle of "Harmony" was at work here.

It is also clear in both cases, when the very next statement in the debate of both resolutions concerns the Harmony of the proposed amendment with the direct taxation clauses of the Constitution, that Congress was well aware whether or not they were contemplating the income tax amendment to provide for a direct tax or an indirect tax. Furthermore, the issue of what was a direct tax versus an indirect tax was exhaustively evaluated by Congress the summer of 1909 as they considered the 16th Amendment and the Corporate Tax Act of 1909. This debate consumes 352 pages of the Congressional Record of which 34 pages relate to the issue of direct taxes vs. indirect taxes. Now the pages of the Congressional Record are large and the print is small. You would have to multiply the above numbers by four to get something equivalent to the number of pages in a book such as this one.

When Congress debated the direct tax vs. indirect issue, the debate wasn't over what constituted one type of tax versus the other, but only as to which was more appropriate. Adam Smith's criteria appeared to have been accepted by all, and as we pointed out earlier, Adam Smith is the most quoted authority on this issue.

It is abundantly clear that Congress realized if it was going to propose an amendment to the Constitution that was going to provide for the levying and collection of a direct tax on incomes, then Congress was going to have to modify the "direct taxation" clauses in the original Constitution. Not once, but twice, other members of Congress had rejected, on this very point, a proposed Constitutional amendment that sought to provide authority for the collection of a direct tax without apportionment without having modified these clauses. We can therefore conclude, as the Supreme Court did in *Brushaber*, that the 16th Amendment only dealt with indirect taxes,

i.e., taxes on incomes and not taxes on sources of incomes (absent a privilege).

We keep revisiting this point because the IRS and the lower courts claim that the 16th Amendment provides authority for a direct tax on income exempted from the apportionment rule. Income taxes on net income from business or unearned income from accumulated wealth are indirect taxes. Income taxes on wages and salaries are direct taxes.

Continuing on, Senator Brown from Nebraska wrote all three versions of the income tax amendment, S.J.R. No. 25, S.J.R. No. 39, and S.J.R. No. 40. You would think that after getting shot down twice on the same point, by the third attempt, i.e., S.J.R. No. 40, he would have gotten it right.

There is more. Our evidence on this point is overwhelmingly compelling. The Senate voted on the 16th Amendment (S.J.R. No. 40) at 1 o'clock on July 5, 1909. Senator Aldrich had earlier tried to ram it through the Senate on Saturday, July 3rd, a holiday weekend, for an immediate vote without debate when only 52 senators were present. A few senators protested and the vote was set for the following Monday.As a result of the minimal debate that did take place on July 3rd, several amendments were proposed to S.J.R. No. 40 that came up for a vote at the appointed hour of 1 PM Monday, July 5th.

The first of these was an amendment to S.J.R. No. 40 by Senator Bailey of Texas to provide that conventions of each of the several States be required to ratify the constitutional amendment as opposed to the state legislatures.

This was voted down. Next was another amendment by Bailey to add the language "and may grade the same" to modify the term "income tax" as a way to provide that the tax may be graduated. Bailey proposed this language on Saturday, July 3rd. By Monday, July 5th, when this came up for a vote, Bailey realized it would fail and tried to have it withdrawn. Bailey wanted it withdrawn because, according to Bailey:

"Mr. President, I am satisfied that this amendment will be voted

> down; and voting it down would warrant the Supreme Court in hereafter saying that a proposition to authorize Congress to levy a graduated income tax was rejected." 44 Cong. Rec. 4120 (1909).

In other words, Senator Bailey understood that once Congress rejected a particular provision while amending the Constitution, Congress would be forever bared from implementing that provision by way of statute in the future. This legal principle applies to all legislation, even to income taxes. It is also why the Framers had the Constitution mandate that Congress keep a journal.

Bailey was told by the Senate's Vice President that he could not withdraw the amendment and that it must be voted on. The rules required it. Senator Aldrich intervened and somehow the rules were suspended and the amendment was withdrawn without a vote.

Next was an amendment by Senator McLaurin of Mississippi. His proposed amendment to S.J.R. No. 40 was as follows:

> "The SECRETARY. Amend the joint resolution by striking out all after line 7 and inserting the following: 'The words 'and direct taxes' in clause 3, section 2, Article I, and the words 'or other direct,' in clause 4, section 9, Article I. of the Constitution of the United States are hereby stricken out.'" 44 Cong. Rec. 4109 (1909).

The Senate rejected this, as this amendment failed by voice vote. Had this amendment passed, it would have provided authority for a species of income tax that was inherently a direct tax to be levied without apportionment, and it would have changed the original wording of the Constitution to forever do away with direct taxes.

Lastly there was an amendment by Senator Bristow of Kansas to replace S.J.R. No. 40 with S.J.R. No. 39. S.J.R. No. 39 read:

> "The Congress shall have the power to lay and collect *direct* [emphasis mine] taxes on incomes without apportionment among the several States according to population."

This substitute amendment also included a provision to elect senators by popular vote. After some debate this was also rejected

by voice vote.

Next, S.J.R. No. 40 was voted on and passed 77 to 15. So what can we conclude from all of this? Well, first of all we can conclude that the Senate understood it was the practice of the Supreme Court to look at the proceedings of Congress to see what the intent of Congress was. If Congress voted on a measure and rejected it, then the Supreme Court would interpret that vote as a clarification of the intent and purposes of Congress.

> "One of the most readily available extrinsic aids to the interpretation of statutes is the action of the legislature on amendments which are proposed to be made during the course of consideration in the legislature. Both the state and federal courts will refer to proposed changes in a bill in order to interpret the statute as finally enacted. The journals of the legislature are the usual sources for this information. Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment." Sutherland on Statutory Construction, sec. 48.18 (5th Edition).

We also learned that twice the Senate was offered the opportunity to vote on a measure to provide that the income tax being considered by the 16th Amendment would provide for a direct tax within the constitutional meaning of the term "direct tax." Twice in the hour or so prior to the final Senate vote on the income tax amendment, the Senate rejected the opportunity to bring direct taxes within the scope of the 16th Amendment. This issue was squarely before Congress, and Congress rejected it.

> "It is plain, then, that Congress had this question presented to its attention in a most precise form. It has the issue clearly drawn. The first alternative was rejected. All difficulties of construction vanish if we are willing to give to the words, deliberately adopted, their natural meaning." U.S. v. Pfitsch, 256 U.S. 547, 552 (1921).

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First,

always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Now of these two opportunities to include direct taxes within the authority of the 16th Amendment, the second of the two also included a provision on the election of Senators by popular vote. But the same issue of the election of Senators was later approved by the Senate and sent out to the several States as the 17th Amendment to the Constitution. This Amendment was purportedly ratified and is now part of our Constitution. Therefore, the reason the second Bristow amendment failed was due to the term "direct taxes" and not because of the election of senators issue.

It can't be any more clear. The 16th Amendment does not provide authority for a direct tax on incomes, but only authority for an indirect tax on incomes. A direct tax on incomes is a tax that diminishes the source of the income. An indirect tax on income is a tax on unearned income or profit; such a tax leaves the source of the income undiminished. Twice during the debates on the 16th Amendment (S.J.R. No. 25 and S.J.R. No. 39), Congress rejected the idea of bringing direct taxes within the authority of the 16th Amendment. Then twice more, on July 5, 1909, Congress rejected the idea by direct vote of the Senate. Despite this congressional hostility to the idea, the IRS and the lower courts admit they are collecting a direct tax. At a minimum this is scandalous. In reality it is probably criminal.

"Acts of Congress are to be construed and applied in Harmony with and not to thwart the purpose of the Constitution." Phelps v. U.S., 274 U.S. 341, 344 (1927).

"Courts should construe laws in Harmony with the legislative intent and seek to carry out legislative purpose. With respect to the tax provisions under consideration, there is no uncertainty

as to the legislative purpose to tax post-1913 corporate earnings. We must not give effect to any contrivance which would defeat a tax Congress plainly intended to impose." Foster v. U.S., 303 U.S. 118, 120-1, (1938).

Today the government's story is that the 16th Amendment provides authority for an unapportioned direct tax. But in 1916 the Attorney General of the United States' office understood this differently. In the case of *Peck & Co. v. Lowe* the attorney general for the United States stated:

"It is, however, equally clear that a general income tax is an excise tax laid upon persons or corporations with respect to their income: that is, a person or a corporation is selected out from the mass of the community by reason of the income possessed by him or it...

This is brought out clearly by the decisions of this court in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, and *Stanton v. Baltic Mining Co.*, 240 U.S. 103. In the former case it was pointed out that the all-embracing power of taxation conferred upon Congress by the Constitution included two great classes, one indirect taxes or excises, and the other direct taxes, and that of apportionment with regard to direct taxes. It was held that the income tax in its nature is an excise; that is, it is a tax upon a person measured by his income...It was further held that the effect of the Sixteenth Amendment was not to change the nature of this tax or to take it out of the class of excises to which it belonged, but merely to make it impossible by any sort of reasoning thereafter to treat it as a direct tax because of the sources from which the income was derived." Brief for the United States at 14-15, Peck & Co. v. Lowe, 247 U.S. 165 (1917).

This argument by the United States was in response to the question put to the court by Peck & Co. as to whether the 16th Amendment created any new taxing power.

"The Sixteenth Amendment to the Constitution has not enlarged

the taxing power of Congress or affected the prohibition against its burdening exports." Brief for Appellant at 11, Peck & Co. v. Lowe, 247 U.S. 165 (1917).

Had the 16th Amendment provided for an unapportioned direct tax this would have been an enlargement of the taxing power of Congress. At least on the issue of whether there was an exemption to the apportionment rule for direct taxes, all parties to the *Peck & Co. v. Lowe Case* agreed there wasn't. The issue of the case dealt with the taxation of export, not direct taxes. We'll see later in this chapter that the Supreme Court ruled that there was no enlargement to the taxation authority of Congress. Therefore it is settled; the 16th Amendment did not grant to Congress an exception to the apportionment rule for direct taxes required by the Constitution.

Just as the intent of Congress should be followed when construing a statute, so must the intent of the People, in their sovereign capacity, be followed when construing an amendment to the Constitution.

The construction of the 21st Amendment to the U.S. Constitution absolutely proves our argument. It was necessary for the 21st Amendment to repeal the 18th Amendment before the 21st Amendment could have any effect. Both Amendments related to "intoxicating liquors." The 18th Amendment prohibited the manufacture, sale, or transportation of them; whereas the 21st Amendment provided for the transportation or importation and use of them. Section 1 of the 21st Amendment reads "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." The 21st Amendment would not have been in Harmony with the totality of the Constitution unless the 18th Amendment was first repealed. Similarly, had it been the intention of Congress to offer to the people an income tax amendment which would give Congress the power to impose a direct tax on the sources of income without apportionment, the 16th Amendment would have provided for such power only by modifying the direct taxing clauses of the Constitution found at article I section 2 clause 3 and article I section 9 clause

4. The 16th Amendment did not do this.

Section 2 of the 18th Amendment included an enforcement clause which read "The Congress and the several States shall have the concurrent power to enforce this article by appropriate legislation." The 21st Amendment did not include such an enforcement clause as the 21st Amendment was not conveying a new power to Congress, but in fact was adding a limitation on the power of Congress. Nor does the 16th Amendment have an enforcement clause, as it does not convey a new power to Congress, but only clarifies a theory of taxation. That theory was the basis for the *Pollock Decision*. The *Pollock Decision* was overturned by the 16th Amendment.

Congress did not modify the direct taxation clauses of the Constitution by the construction of the 16th Amendment. Therefore, the 16th Amendment does not provide authority for a direct tax on sources of income which enjoy constitutional protection. (Some sources of income do not enjoy constitutional protection, like income derived from sources in without (outside) the several States of the Union.) Therefore, there is no authority for Congress to tax the wages and salaries of an American Citizen living and working in one of the several States of the Union, unless that tax is apportioned.[2]

All the 16th Amendment did was to prevent an income tax, which was constructed to be inherently an indirect tax, from being declared a direct tax due to a consideration of the source from which the income came. The 16th Amendment struck down the theory upon which the *Pollock Case* was decided. After ratification of the 16th Amendment, taxes which diminish the source of income, absent a privilege, are inherently direct taxes, whereas those that diminish only the income flowing from a source are inherently indirect. Only the latter may be levied under the authority of the 16th Amendment.

Whenever Congress has the power to define the word "income," those geographical areas, those persons, or those things for which the word "income" can be defined by Congress do not enjoy protection from the constitutional limitations placed on Congress as it

relates to the imposition of an income tax. In order to really understand the Internal Revenue Code, you need to resolve whether or not you are a person or a thing, or whether you live in a geographical area for which Congress has the power to define the word "income" uninhibited by the 16th Amendment. If you don't understand this last paragraph, reread Chapter 4.

Hypothetical Case II:
Income Tax is an Indirect Tax

This is the case where the author camps. This is also where the Supreme Court camps. This is the case where the 16th Amendment reversed the *Pollock Decision* and forever placed taxes on incomes within the classification of indirect taxes. But the 16th Amendment has only done so for income taxes that are inherently indirect. Income taxes that are inherently direct remain outside the scope of the 16th Amendment. In the case of *Brushaber v. Union Pacific Railroad Co.*, the first question Brushaber brought before the Court was:

> "The evident purpose of this amendment [16th] was not to abandon the former policy of safeguarding the several sections of the Union against disproportionate taxation, but merely to substitute an apportionment according to 'incomes for whatever source derived,' in lieu of a *per capita* apportionment." Brief for Appellant at 10-11, Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1916).

In other words, Brushaber was asserting that the 16th Amendment provided for a constitutionally direct income tax still subject to the rule of apportionment, although now apportionment would be measured by the incomes of the several States and not measured by their population. In the brief for the government, the government also asserted that the 16th Amendment provided authority for a constitutionally direct income tax.

> "1. Income taxes, at least when laid on income derived from real or personal property, are direct taxes, and therefore not

subject to the uniformity rule, EXPRESSLY prescribed by the Constitution.

(a) It is settled that the uniformity requirement of clause 1 of section 8 of Article I of the Constitution, is limited to duties, imposts, and excises, and does not apply to *direct* taxes. *Pollock v. F.L. & T. Co.,* 157 U.S. 557; *Spreckels Sugar Refining Co. v. McLean [sic.],* 192 U.S. 397, 413; *License Tax Cases,* 5 Wall. 462, 471. And the *Pollock* case (158 U.S. 601, 637), finally determines that a tax on income derived from either real or personal property is a *direct* tax.

(b) Apportionment being restricted to *direct* taxes *only (Flint v. Stone Tracy Co., supra 152)*, the Sixteenth Amendment, in removing that restriction, recognized *any* tax upon income 'from whatever source derived' as a *direct* tax, and as such subject to the apportionment rule unless specifically exempted." Brief for the United States at 11-12, Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1916).

So, both Brushaber and the government asserted that the 16th Amendment provided for a species of direct tax, i.e., an income tax, to be levied as a direct tax without the normal rule of apportionment as required by the Constitution. The Supreme Court stated they were both wrong! Commenting on the briefs, and the question brought before the Court, the Court said:

"The various propositions are so intermingled as to cause it to be difficult to classify them. We are of opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this ***erroneous assumption*** [emphasis mine] will be made clear by generalizing the many contentions advanced in argument to support it, as follows: (a) The Amendment authorizes only a particular character of direct tax without apportionment, and therefore if a tax is levied under its assumed

> authority which does not partake of the characteristic exacted by the Amendment, it is outside of the Amendment, and is void as a direct tax in the general constitutional sense because not apportioned. (b) As the Amendment authorizes a tax only upon incomes 'from whatever source derived,' the exclusion from taxation of some income of designated persons and classes is not authorized, and hence the constitutionality of the law must be tested by the general provisions of the Constitution as to taxation, and thus again the tax is void for want of apportionment." Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 10-11 (1916).

Unfortunately, the above quote from the *Brushaber Opinion* is written with run-on sentences and unnecessarily complex sentence structure. *Cornell Law Quarterly* reported on the *Brushaber Case* using easier to understand language. According to *Cornell Law Quarterly*, the question put to the Supreme Court was:

> "The contention of the appellant was as follows:
> '(I) The sixteenth amendment provided for a new kind of a direct tax, a tax on incomes 'from whatever source derived.'"
> Ramon Siaca, The Federal Income Tax Law of 1913: Construction of the Sixteenth Amendment, 1 Cornell Law Review 298, 299 (1916).

The Court's answer to this question was that income taxes are not direct taxes, but are inherently indirect taxes. Now this holds when it is net income that is being taxed and the underlying source remains untaxed. Here the Supreme Court was using the word "income" as the American people understood the word to mean, that being unearned income or severed profit. *The Brushaber Case* was about the payment of a tax on a corporation. It had nothing to do with wages or salaries.

To determine what it is that is actually being taxed, examine what is being diminished by the tax. Is the source being diminished by the tax? Or is it only the income stream that flows from the source that is being diminished by the tax, thus allowing the underlying source of the income to remain whole? When only the income that flows

from the source is diminished by the tax, the tax is inherently indirect and the 16th Amendment provides that the nature of the source, i.e., land or personal property, shall not be considered when attempting to classify the tax as direct or indirect. The theory upon which *Pollock* was decided had no effect once the 16th Amendment was purportedly ratified.

The Supreme Court's answer to the question brought forward by *Brushaber* was:

> "It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense, - an authority already possessed and never questioned, - or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived." Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 17-18 (1916).

> "Second, that the contention that the Amendment treats a tax on income as a direct tax, although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also *wholly without foundation* [emphasis mine] since the comment of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived forbids the application to such taxes of the rule applied in the Pollock Case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity, and were placed under the other or direct class." id. at 18-19.

> "Indeed, from another point of view, the Amendment demonstrates that no such purpose was intended, and on the contrary shows that it was drawn with the object of maintaining the limitations of the Constitution and *harmonizing* [emphasis mine]

their operation." id. at 19.

Again, the *Cornell Law Quarterly* simplifies what the Court said:

"The court through Chief Justice White held that the tax was constitutional. The major proposition of the appellant's argument is not true. Hence, the conclusion does not follow. The sixteenth amendment does not permit a new class of direct tax, (in fact as it will be later shown, the court does not think that the amendment treated the tax as a direct tax at all), carrying with it the distinguishing characteristic of a hitherto unrecognized uniformity.

The amendment, the court said, judged by the purpose for which it was passed, does not treat income taxes as direct taxes but simply removed the ground which led to their being considered as such in the Pollock case, namely, the source of the income. Therefore, they are again to be classified in the class of indirect taxes to which they by nature belong." Ramon Siaca, The Federal Income Tax Law of 1913: Construction of the Sixteenth Amendment, 1 Cornell Law Quarterly 298, 299 and 301 (1916).

Said another way, the theory upon which the *Pollock Case* was decided was overturned by the 16th Amendment.

Harvard Law Review had this commentary on the *Brushaber Case*:

"In *Brushaber v. Union Pacific Railroad Co.*, Mr. Chief Justice White, upholding the income tax imposed by the Tariff Act of 1913, construed the Amendment as a declaration that an income tax is 'indirect,' rather than as making an exception to the rule that direct taxes must be apportioned." The Income Tax and the Sixteenth Amendment, 29 Harvard Law Review 536 (1915-6).

Also, commenting on *Brushaber, California Law Review* said:

"The constitutionality of this act and the construction of the 16th Amendment have been passed by the Supreme Court in

the case of Brushaber v. Union Pacific Railroad Co. The construction which Mr. Chief Justice White....lays upon the 16th Amendment, as declaring that income taxes are to be regarded as indirect rather than as excepting them from the rule of uniformity...the one (construction) adopted by the court has the merit of harmonizing all of the provisions of the Constitution, and of subjecting income taxes to the requirement of uniformity." Constitutional Law: Income Tax: Sixteenth Amendment, 4 California Law Review 333, 335-6 (1915-6).

And finally from the field of economics we have the following report from *The Journal of Political Economy*:

"Finally it holds the purpose of the amendment was not to change the existing interpretation of the term 'direct tax', except to the extent necessary to accomplish the result intended - that is, the prevention of any resort to the sources from which a taxed income is derived in order to cause such a direct tax on the income to be held to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties, and imposts and place it in the class of direct taxes." Washington Notes, The Income Tax Decision, 24 The Journal of Political Economy 299, 300 (1916).

This point is being belabored because it is precisely this point on which the government is in error. The government claims that the 16th Amendment provides an exception to the direct taxation clause of the Constitution whereby a direct tax can be levied on the wages and salaries of the American People without apportionment. As you can see the Supreme Court has already ruled on the question and that ruling is today being ignored by the IRS and by the lower courts. For example, the Ninth Circuit Court of Appeals stated:

"Notwithstanding Becraft's insistence that...his position can fairly be reduced to one elemental proposition: 'The Sixteenth Amendment does not authorize a direct non-apportioned income tax on resident United States citizens and thus such citizens are not subject to the federal income tax laws.' [2] We hardly need

comment on the patent absurdity and frivolity of such a proposition. For over 75 years, the Supreme Court and the lower federal courts have both implicitly and explicitly recognized the Sixteenth Amendment's authorization of a non-apportioned direct income tax on United States citizens residing in the United States... See, e.g., Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 12-19." In Re Becraft, 885 F.2d 547, 548 (9th Cir. 1989).

By now you should realize that Becraft was right and the Ninth Circuit was wrong. The Ninth Circuit utterly misquotes the *Brushaber Case*. In its *Brushaber Ruling*, the Supreme Court harmonized the 16th Amendment with the original Constitution when it rejected the claim by both Brushaber and the government that the 16th Amendment authorized a "non-apportioned direct income tax."

Most of the other circuits have similar rulings. Compounding the problem are the commentaries on the law itself. If one looks up the Constitution in Volume 1 of the United States Code Annotated published by West Publishing Co., you will see in the footnotes that West Publishing Co. claims that the 16th Amendment provides this exemption to the apportionment rule required by the Constitution for direct taxes. West Publishing Co. is simply wrong as the Supreme Court has ruled otherwise.

Taking the "belt and suspenders" approach and double checking our conclusion, we will look at three other cases. The first of these is *Tyee Realty Co. v. Anderson*. One of the questions brought before the Supreme Court was as follows:

"Every contention relied upon for reversal in the two cases is embraced within the following propositions: (a) that the tax imposed by the statute was not sanctioned by the 16th Amendment because the statute exceeded the exceptional and limited power of direct income taxation for the first time conferred upon Congress by that Amendment, and, being outside of the Amendment, and governed solely therefore, by the general taxing authority conferred upon Congress by the Constitution, the tax was void as an attempt to levy a direct tax without apportion-

ment." Tyee Realty Co. v. Anderson, 240 U.S. 115, 117 (1916).

The *Tyee* question was the same question as in *Brushaber.* The Supreme Court's answer:

> "But we need not now enter into an original consideration of the merits of these contentions because each and all of them were considered and adversely disposed of in *Brushaber v. Union Pac. R.R. Co.* That case, therefore, is here absolutely controlling and decisive." id. at 117-8.

Bundled with the *Brushaber Case* was another case called *Edward Thorne v. Charles W. Anderson, Collector of Internal Revenue.* In this case the plaintiff, Thorne, also argued that the 16th Amendment provided new taxation power for Congress. Thorne said that the 16th Amendment allowed for an exemption to the apportionment rule for direct taxes. As we saw in the *Brushaber Opinion,* such an assertion is "wholly without foundation."[3]

Furthermore, in the case of *Stanton v. Baltic Mining Co.*, again this question was presented to the Supreme court:

> "Class B: (1) That as the 16th Amendment authorizes only an exceptional direct income tax without apportionment..." Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916).

The Supreme Court ruled:

> "But, aside from the obvious error of the proposition, intrinsically considered, it manifestly disregards the fact that by the previous ruling (*Brushaber*) it was settled that the provisions of the 16th Amendment conferred no new power of taxation, but simply *prohibited* [emphasis mine] the previously complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which they *inherently* [emphasis mine] belonged and being placed in the category of direct taxation subject to apportionment." Stanton v. Baltic Mining Co., 240 U.S. 103, 112-3 (1916).

By the Supreme Court's statement: "conferred no new power

of taxation" in the *Stanton v. Baltic Mining Co. Case*, what the court was saying was the two constitutional classes of taxation remained intact upon ratification of the 16th Amendment. Any constitutional provision allowing for an unapportioned direct tax on incomes would constitute a new class of taxes. This didn't happen, so there is therefore no new class of taxes under the Constitution.

> "Thus, in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises." Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 557 (1895).

Respectfully submitted,

Philip Lewis Hart

Appendix H

UNITED STATES TAX COURT

PHILIP LEWIS HART, Petitioner,	)	
v.	)	Docket No. 10398-98
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

DECISION

Pursuant to the opinion of this Court filed March 7, 2000, [T.C. Memo. Opinion 2000-78] and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED:

That there is a deficiency in income tax and additions to tax due from the petitioner Philip Lewis Hart as follows:

		Additions to Tax	
Year	Deficiency	6654 (a)	6662 (a)
1994	$5,142.00	-	$1,028.40
1995	$7,430.00	None	$1,486.00

That there is a penalty under I.R.C. § 6673 due from the petitioner Philip Lewis Hart in the amount of $10,000.00.

(Signed) JOHN J. PAJAK
Special Trial Judge

Entered: NOV 2 2000

Decision of the Tax Court

UNITED STATES TAX COURT
WASHINGTON, DC 20217

PHILIP LEWIS HART, Petitioner,	)	
v.	)	Docket No. 16155-98
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

DECISION

Pursuant to the determination of this Court as set forth in T.C. Memo. Opinion 2000-78, filed March 7, 2000, it is

ORDERED and DECIDED: (1) That there is a deficiency in the petitioner's Federal income tax for the taxable year 1996 in the amount of $12,497; (2) an addition to tax under section 6651 (a) (1) for the taxable year 1996 in the amount of $3,124; (3) an addition to tax under section 6654 for the taxable year 1996 in the amount of $665. It is further

ORDERED and DECIDED: That a penalty is due from petitioner which is hereby awarded to the United States in the amount of $10,000 pursuant to I.R.C. section 6673.

John J. Pajak
Special Trail Judge

ENTERED: NOV 2 2000